DOCKET

No. 07-773

Title:	Betty E. Vaden, Petitioner v. Discover Bank, et al.
Docketed:	December 11, 2007
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(06-1221)
Decision Date:	June 13, 2007
Rehearing Denied:	July 10, 2007

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 18 2007	Application (07A258) to extend the time to file a petition for a writ of certiorari from October 8, 2007 to December 7, 2007, submitted to The Chief Justice.
Sep 24 2007	Application (07A258) granted by The Chief Justice extending the time to file until December 7, 2007.
Dec 7 2007	Petition for a writ of certiorari filed. (Response due January 10, 2008)
Jan 3 2008	Order extending time to file response to petition to and including February 11, 2008.
Feb 11 2008	Brief of respondents Discover Bank, et al. in opposition filed.
Feb 22 2008	Reply of petitioner Betty E. Vaden filed.
Feb 27 2008	DISTRIBUTED for Conference of March 14, 2008.
Mar 17 2008	Petition GRANTED.
Apr 21 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 2, 2008.
Apr 21 2008	The time within which to file respondents' brief on the merits is extended to and including August 1, 2008.
Jun 2 2008	Joint appendix filed. (Statement of costs filed)
Jun 2 2008	Brief of petitioner Betty E. Vaden filed.
Jun 9 2008	SET FOR ARGUMENT ON Monday, October 6, 2008.
Jul 3 2008	CIRCULATED
Jul 22 2008	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for both parties.
Jul 30 2008	Record received from the U.S.C.A. for the Fourth Circuit. (1 box). The record for the U.S.D.C. for the District of Maryland is electronically filed.
Aug 1 2008	Brief of respondents Discover Bank; Discover Financial Services, Inc. filed. (Distributed)
Aug 8 2008	Brief amici curiae of Chamber of Commerce of the United States, et al. filed. (Distributed)

Aug 8 2008	Brief amicus curiae of Cintas Corporation filed. (Distributed).
Aug 8 2008	Brief amici curiae of Financial Services Roundtable, et al. filed. (Distributed)
Aug 8 2008	Brief amici curiae of Law Professors filed. (Distributed)
Sep 2 2008	Reply of petitioner Betty E. Vaden filed. (Distributed)
Oct 6 2008	Argued. For petitioner: Daniel R. Ortiz, Charlottesville, Va. For respondents: Carter G. Phillips, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK & DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a suit seeking to enforce a state-law arbitration obligation brought under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, "aris[es] under" federal law, see 28 U.S.C. § 1331, when the petition to compel itself raises no federal question but the dispute sought to be arbitrated—a dispute that the federal court is not asked to and cannot reach—involves federal law.

2. If so, whether a "completely preempted" state-law *counter*claim in an underlying state-court dispute can supply subject matter jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the Fourth Circuit (App., *infra*, 1a-39a) are reported at 489 F.3d 594. The initial opinion of the Fourth Circuit (App., *infra*, 57a-74a) is reported at 396 F.3d 366. The opinion (App., *infra*, 40a-54a) and order (App., *infra*, 55a-56a) of the district court are reported at 409 F. Supp. 2d 632. An earlier opinion (App., *infra*, 75a-88a) and order (App., *infra*, 89a-90a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2006. The court of appeals denied a timely petition for rehearing on July 20, 2007 (App., *infra*, 91a-92a). On September 24, 2007, the Chief Justice extended the time within which to file this petition for certiorari to and including December 7, 2007. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

STATEMENT

This case presents two issues: (1) whether 28 U.S.C. § 1331 grants federal courts subject matter jurisdiction over petitions to compel arbitration, see 9 U.S.C. § 4, that themselves do not raise federal questions but that seek arbitration of federal claims; and (2) if "looking through" the pleadings to find federal question subject matter jurisdiction is permissible, whether a "completely preempted" state-law *counter*claim can supply such jurisdiction.

A. Statutory Framework

1. Section 1331 vests federal courts with subject matter jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This Court has long recognized, however, that Section 1331 does not extend to every case in which federal law is potentially an "ingredient" of the plaintiff's claim, *Osborn* v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 822-827 (1824). See *Franchise Tax Bd.* v.

Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 n.8 (1983).

In particular, a case "aris[es] under" federal law for purposes of Section 1331 only where "the plaintiff's statement of his own cause of action shows that it is based upon [federal law.] It is not enough that the plaintiff alleges some anticipated defense to his cause of action * * * invalidated by some provision of the Constitution of the United States." *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908); see *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002); *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). Even "[a] suit to enforce a right which takes its origin in [federal law] * * * is not necessarily, or for that reason alone, one arising under those laws"; rather, the suit must "really and substantially involve[] a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912). And such a claim will still not be heard in federal court if doing so would "disturb[] [the] * * * balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

This construction not only avoids complicated inquiries at the jurisdictional stage, see *Holmes Group*, 535 U.S. at 832, but also helps to reduce friction between federal courts and states, see *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 32 (2002) ("Due regard for the rightful independence of state governments * * * requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

(quoting *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934)). These principles also apply to suits on removal under 28 U.S.C. § 1441(a). *Caterpillar*, 482 U.S. at 392; see also *Holmes Group*, 535 U.S. at 831-834 (applying construction to "arising under" language of 28 U.S.C. §§ 1338(a) and 1295(a)(1)); cf. *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("[Federal courts] possess only that power authorized by Constitution and statute[.] * * * It is to be presumed that a cause lies outside this limited jurisdiction." (citation omitted)).

2. The Federal Arbitration Act (FAA or the Act), 9 U.S.C. §§ 1 *et seq.*, was enacted to overturn centuries of judicial hostility to arbitration[1] and "to make arbitration agreements as enforceable as other contracts," *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). The "centerpiece" of the FAA is Section 2, which "makes a written agreement to arbitrate * * * 'valid, irrevocable, and enforceable.'" *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quoting 9 U.S.C. § 2). Sections 9, 10, and 11 of the Act, 9 U.S.C. §§ 9-11, prescribe the procedures for, respectively, confirming, vacating, or modifying an arbitration award by application to the district court "where the award was made or in any

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[1] For an example of judicial hostility to arbitration, see *Atlantic Fruit Co.* v. *Red Cross Line*, 5 F.2d 218 (2d Cir. 1924), a pre-FAA admiralty case refusing to enforce an arbitration agreement because "federal courts like those of the states and of England have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes." *Id.* at 220 (quoting *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-121 (1924)).

district proper under the general venue statute [28 U.S.C. § 1391]." *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 195 (2000).

Section 4—the subject of this petition—provides parties a remedy for enforcing arbitration agreements. It states in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Because the FAA is an "anomaly" in not itself creating federal jurisdiction, a federal court can hear a Section 4 petition only when there is an "independent" ground for jurisdiction. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). This result, courts have explained, is consistent with Congress's determination that agreements to arbitrate be placed on equal footing—*i.e.*, be "as enforceable as other contracts, *but not more so*." *E.g.*, *Community State Bank* v. *Strong*, 485 F.3d 597, 628 (11th Cir.) (Marcus, J., concurring) (quoting *Prima Paint*, 388 U.S. at 404 n.12), reh'g en banc granted, No. 06-11582, 2007 WL 4111380 (11th Cir. Sept. 10, 2007).

B. Proceedings Below

1. *Vaden I*

In July 2003, Discover Financial Services, Inc. (DFS) sued petitioner Betty E. Vaden in Maryland state court for nonpayment of a credit card balance over $10,000. App., *infra*, 59a. Ms. Vaden responded with counterclaims against DFS for "illegal assessment of finance charges, late fees, and interest rates and breach of contract in violation of Maryland law." *Id.* at 41a; see also *id.* at 44a. Respondents DFS and Discover Bank (together "Discover") then filed a petition in Maryland federal court to compel arbitration of Vaden's state-law counterclaims. *Id.* at 59a.

According to Discover, arbitration was required under an amendment to Ms. Vaden's credit card agreement. App., *infra*, 59a. Discover claimed that it mailed her a notice of the amendment and because she continued to use her credit card she had accepted the change. *Id.* at 60a. Ms. Vaden maintained, though, that no agreement existed, pointing to Discover's records indicating that the notice had been sent only to "Platinum" card holders and that her account had not been upgraded to "Platinum" status at the time it was sent out. *Ibid.*

After finding that a valid and enforceable arbitration agreement existed, the federal district court ordered arbitration of Ms. Vaden's state-law counterclaims. App., *infra*, 61a; *id.* at 86a. On appeal, the Fourth Circuit raised the issue of the district court's subject matter jurisdiction, *id.* at 61a, holding that a suit seeking to compel arbitration "aris[es] under" federal law for purposes of

Section 1331 whenever "the controversy *underlying* the arbitration agreement presents a federal question." *Id.* at 63a (emphasis added).

The Fourth Circuit recognized that it was deepening a conflict among the courts of appeals concerning federal question jurisdiction over Section 4 petitions. App., *infra*, 62a. Under the "narrower" approach to jurisdiction, "the federal question must be evident on the face of the arbitration petition itself." *Ibid.* (citing *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263 (2d Cir. 1996) as representative of that view). By contrast, the "broader" approach, followed by the Eleventh Circuit in *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212 (1999), "permits a federal court to examine the underlying dispute between the parties to determine if a federal question is present." *Id.* at 63a.

The Fourth Circuit committed itself to this latter, "look-through" approach, identifying three phrases in Section 4 as supporting its position. The court read the phrase "jurisdiction * * * arising out of the controversy between the parties" to refer to the "overall substantive conflict between the parties" and not to the "discrete dispute" about the arbitration agreement itself. App., *infra*, 66a. The court also reasoned that requiring federal questions to appear on the face of the petition itself would "siphon[] off federal question jurisdiction" and thus effectively rewrite "Title 28" to exclude Section 1331. *Ibid.* Finally, the court interpreted "save for such agreement" as an "instruction to set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently," *id.* at 64a, *i.e.*,

to look through to the underlying dispute, rejecting the position that those words were included to express the FAA's break with the common law's refusal to entertain claims seeking specific performance of promises to arbitrate, *id.* at 65a n.2.

To further support its holding, the Fourth Circuit analogized this approach to that governing jurisdiction over declaratory judgment suits. App., *infra*, 68a-70a. In a declaratory judgment action, jurisdiction may be based on the presence of a federal question in the hypothetical complaint prompting the would-be defendant's preemptive action; jurisdiction over Section 4 petitions, the Fourth Circuit reasoned, should similarly depend on "whether a federal action prompted the motion to compel arbitration." *Id.* at 69a. The contrary position, the court explained, would frustrate the "liberal federal policy favoring arbitration agreements." *Id.* at 70a (quoting *Moses H. Cone*, 460 U.S. at 24).

The court concluded that even under the look-through rule, however, the district court's subject matter jurisdiction over Discover's petition was uncertain. App., *infra*, 73a. Because Ms. Vaden's counterclaims alleged violations of *state* law, look-through jurisdiction would require a finding that the claims were "*completely* preempted." *Id.* at 73a n.3 (emphasis added); see *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6-8 (2003); App., *infra*, 44a ("Under the doctrine of complete preemption, a complaint that alleges only state law causes of action may be removed when the state claims necessarily invoke a federal law." (citing *Caterpillar*, 482 U.S. at 393)). Moreover, because her claims were against DFS, not Discover Bank, and the only plausible

theory of complete preemption implicated the Federal Deposit Insurance Act (FDIA), 12 U.S.C. §§ 1811 *et seq.*—a statute applicable only to Discover Bank—the petition could proceed only if the district court determined that the real "party of interest" for her claims was Discover Bank. App., *infra*, 73a n.3. The Fourth Circuit also instructed the district court, if it found subject matter jurisdiction, to reexamine whether a genuine factual dispute remained as to whether Ms. Vaden had agreed to arbitration. *Id.* at 73a n.4.

2. *Vaden II*

On remand, the district court found federal question jurisdiction over the petition, concluding that the FDIA has "complete[ly] preempt[ive]" force, App., *infra*, 48a, and that Discover Bank was the "real party in interest," *id.* at 46a, 48a. Finding further that an agreement to arbitrate existed, it again ordered Ms. Vaden to arbitrate her counterclaims. *Id.* at 53a.

A divided panel of the Fourth Circuit affirmed. App., *infra*, 28a. Acknowledging that the complete preemption doctrine "orginate[d] in the removal context," where it has only been applied to *complaints* (not counterclaims), the panel majority nevertheless held that applying the doctrine in this context was justified. *Id.* at 8a n.3. It was not, in the panel's words, "a logical leap" to rely on complete preemption to find federal question jurisdiction because the doctrine was not tied to "the procedural act of removal, but [to] the dominance of federal law over the preempted state law." *Ibid.*

Judge Goodwin dissented, faulting the majority opinion's "inexplicabl[e] use [of] the removal doctrine of complete preemption to recharacterize a *counterclaim* in a state court civil action as federal." App., *infra*, 28a. He also criticized the majority opinion for "evad[ing] [this Court's] clear holding in *Holmes Group*," *id.* at 34a, *i.e.*, that federal question jurisdiction could not be grounded on a counterclaim, *id.* at 33a. "[C]omplete preemption," he explained, "is solely a removal doctrine," *id.* at 34a, that has "but one purpose—that is, the recharacterization of a *plaintiff's* state *complaint* so that it may be considered federal for the purposes of the well-pleaded complaint rule," *id.* at 35a.

The dissenting opinion also registered disagreement with *Vaden I*, noting that the initial decision was against the "clear weight of authority." App., *infra*, 39a. "[F]inding federal question jurisdiction * * * only to enforce a private contract," Judge Goodwin explained, "considerably, and * * * unjustifiably, expands federal court jurisdiction," *ibid.* (citing *Strong*, 485 F.3d at 616 (Marcus, J., concurring)), and "elevate[s] [arbitration agreements] over other forms of contract," *id.* at 38a (quoting *Prima Paint*, 388 U.S. at 404 n.12). Thus "troubled" that the FAA had become a "make weight for jurisdiction," Judge Goodwin rejected not only the majority's holding, but also the underlying look-through jurisdiction rule embraced in *Vaden I*. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Look-Through Rule Worsens An Already Deep Split Among The Circuits And Is Incorrect On The Merits

A. The Courts Of Appeals Are Divided As To Whether The Federal Character Of The Issue The Parties Have Agreed To Arbitrate Can Supply Federal Jurisdiction Over A Section 4 Petition

As the Fourth Circuit acknowledged, "the courts of appeals are in disagreement as to whether—in a suit to compel arbitration authorized by [FAA] § 4—a district court has subject matter jurisdiction of a case when the underlying dispute between the parties raises a federal question." App., *infra*, 62a.[2] In this situation, four circuits have held that Section 1331 does not permit a federal district court to "look through" pleadings that themselves contain no properly invoked federal question to find jurisdiction based on a federal question in the underlying dispute.

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[2] Other courts have also noted this split. See, *e.g.*, *Community State Bank* v. *Strong*, 485 F.3d 597, 615 (11th Cir.) (Marcus, J., concurring) (noting that "the circuits are plainly split" as to whether jurisdiction over a Section 4 petition can be based on federal questions in the dispute to be arbitrated), reh'g en banc granted, No. 06-11582, 2007 WL 4111380 (11th Cir. Sept. 10, 2007); *In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M:06-cv-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007) (noting "a substantial circuit split" on the issue and granting certification for interlocutory appeal on this basis), interlocutory appeal granted, No. 07-80046 (9th Cir. July 24, 2007).

The Fourth Circuit has unequivocally committed itself to the opposite conclusion, joining two other circuits. Given the starkness of the conflict and the pervasiveness of lower court confusion about this fundamental and recurring question of federal jurisdiction—not to mention the costly uncertainty engendered by the Fourth Circuit's expansive approach—this Court's review is warranted.

1. The Second, Fifth, Sixth, and Seventh Circuits have held that federal question subject matter jurisdiction over a Section 4 suit must be determined by reference to the well-pleaded allegations of the petition itself. Under this well-pleaded petition rule, a petition that seeks to enforce a contractual arbitration obligation does not "arise under" federal law merely because the issue to be arbitrated is federal in character.

The Fifth Circuit was the first to reject explicitly the argument that federal question jurisdiction should depend on the character of the issues to be arbitrated. In *Prudential-Bache Securities, Inc.* v. *Fitch*, 966 F.2d 981 (5th Cir. 1992), plaintiffs filed suit in state court, asserting state-law and federal securities law claims. *Id.* at 983. After unsuccessfully trying to remove the suit, the defendant brought a second suit in federal court, seeking to compel arbitration. *Ibid.* The court dismissed this second suit for want of jurisdiction, holding that "a party seeking to enforce rights created by the FAA must do so in state court unless federal jurisdiction is independently established by the allegations of the plaintiff's own complaint or unless the case is already in federal court." *Id.* at 989. Because the plaintiffs sought only to enforce the

terms of the parties' arbitration agreement—a state-law contract—their underlying dispute with the defendant was not properly part of the petition filed in federal court to compel arbitration. *Id.* at 988. And in light of this Court's admonition that the FAA "does not create any independent federal-question jurisdiction," *ibid.* (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)), the Fifth Circuit concluded, there was "no indication that Congress in enacting the FAA, or the Supreme Court in interpreting it, intended to change the rules for determining federal jurisdiction over a complaint," *id.* at 988.[3] Thus, the federal securities law claims in the underlying case were irrelevant and the court had no federal question jurisdiction over the action. *Ibid.*[4]

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[3] The court also read the FAA's history as support for its conclusion, linking Section 4 with Congress's rejection of the "arcane English common law rule" of ouster, under which courts—staffed by judges paid by the case—refused to enforce arbitration agreements that would "deprive the court of jurisdiction over a case" and therefore cause "depletion of the judge's case load and accompanying fees." *Prudential-Bache*, 966 F.2d at 987. Section 4's reference to the court that would have jurisdiction "save for such agreement" was not meant to abrogate ordinary limitations on federal question jurisdiction (as the Fourth Circuit concluded below, see App., *infra*, 64a-65a), but rather to make clear that federal courts were, on the terms set out, authorized and required to entertain suits whose only demand for relief was specific performance of an executory agreement to arbitrate. 966 F.2d at 987-988.

[4] Although a later Fifth Circuit decision, *Rio Grande Underwriters, Inc.* v. *Pitts Farms, Inc.*, 276 F.3d 683 (2001), appears to take an approach similar to the Fourth Circuit's—and has created some confusion in district courts of the Fifth Circuit, see p. 18, *infra*—it is clear that *Prudential-Bache*

Likewise, the Second Circuit has held that a federal court does not have jurisdiction over a petition to compel arbitration "merely because the underlying claim raises a federal question." *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263, 268 (1996). In *Westmoreland*, the court held that the federal courts lacked subject matter jurisdiction over an investment firm's petition to stay arbitration that had been commenced by customers alleging violations of federal securities law. *Id.* at 264-265.[5] It explained that basic rules of federal jurisdiction required dismissal because the federal nature of the customers' claims was not the source of any right asserted in the Section 4 suit and was therefore "not part of a 'well-pleaded complaint' asking the court to stay arbitration." *Id.* at 269.

The Second Circuit also recognized the "odd distinction" that would result from reading Section 4 as expanding jurisdiction. Other sections of the FAA, the court explained, contain language that "suggests a bestowal of jurisdiction"—but have been interpreted

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remains binding there. *Goodman* v. *Harris County*, 443 F.3d 464, 467-468 (5th Cir. 2006) ("In the event of conflicting panel opinions[,] * * * the earlier one controls." (citation omitted)). Indeed, even absent this strict "prior panel" rule, it would be clear that *Rio Grande*, which addressed the issue only in *dictum*, and did so in a case where neither the court nor the parties even cited *Prudential-Bache*, could not overrule precedent.

[5] *Westmoreland* involved a suit brought under FAA Section 4 seeking to *stay* arbitration, a remedy not explicitly authorized by the text of that provision. Because the court concluded that subject matter jurisdiction was lacking, it did not reach the question whether a stay is in fact available under Section 4. *Westmoreland*, 100 F.3d at 266 n.3.

as not conferring jurisdiction. *Westmoreland*, 100 F.3d at 268; see 9 U.S.C. § 9 (authorizing application to confirm arbitration award "to the United States court in and for the district within which such award was made"); *id.* § 10 (authorizing an action to vacate arbitration award in "the United States court in and for the district wherein the award was made"). Under the look-through construction of Section 4, a petition to compel arbitration could be brought in federal court on the basis of a federal question in the underlying dispute but an application to confirm or vacate the resulting arbitration award could not, a result the Second Circuit saw as "truly * * * 'bizarre.'" *Westmoreland*, 100 F.3d at 268 (quoting *Drexel Burnham Lambert, Inc.* v. *Valenzuela Bock*, 696 F. Supp. 957, 963 (S.D.N.Y. 1988)).

The Sixth and Seventh Circuits, too, have held that a federal question in the underlying dispute does not supply jurisdiction over a Section 4 petition. See *Smith Barney, Inc.* v. *Sarver*, 108 F.3d 92, 94 (6th Cir. 1997) (noting that "the federal nature of the underlying claims that were submitted to arbitration" does not supply federal jurisdiction over a Section 4 petition, but concluding that diversity jurisdiction was present); *Wisconsin* v. *Ho-Chunk Nation*, 463 F.3d 655, 660 (7th Cir. 2006) ("[W]e do not look through to the underlying complaint in arbitration to ascertain whether subject matter jurisdiction obtains."); see also *Kasap* v. *Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1246 (D.C. Cir. 1999) (observing that the "clear weight of authority" supports this understanding of federal question jurisdiction).

2. In direct conflict with these decisions adhering to the well-pleaded complaint rule in Section 4 cases, the First, Fourth, and Eleventh Circuits have now taken the starkly opposite approach. As noted above, the Fourth Circuit could not have been more emphatic in its disagreement—it expressly considered and rejected the reasoning of the Second and Fifth Circuits before concluding that "when a party comes to federal court seeking to compel arbitration, the presence of a federal question in the underlying dispute is sufficient to support subject matter jurisdiction." App., *infra*, 59a.

In holding that federal courts should look through the petition filed in federal court to find jurisdiction based on federal issues in the underlying dispute, the Fourth Circuit joined two other circuits that had previously reached this conclusion. See *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999) ("[I]t is appropriate for us to 'look through' Tamiami's arbitration request at the underlying licensing dispute in order to determine whether Tamiami's complaint states a federal question."); *PCS 2000 LP* v. *Romulus Telecomms., Inc.*, 148 F.3d 32, 34-35 (1st Cir. 1998) (deciding jurisdiction over a Section 4 petition based on the underlying dispute, but affirming dismissal because the claim was not federal).

3. The conflict evident in decisions such as *Westmoreland* and the one below has led to substantial confusion and disagreement among (and within) the courts of appeals, as well. Indeed, this confusion can be seen even in the circuits that have come down on one side of the circuit split or the other.

The leading decision of the First Circuit, for example, takes a peculiar zig-zag approach to the question. The court in *PCS 2000* looked to the underlying dispute and dismissed a Section 4 petition for lack of jurisdiction because it found no federal issue. 147 F.3d at 34-35. But strangely, the court *also* cited—with apparent approval—the Second Circuit's decision in *Westmoreland*, a case on the opposite side of the circuit split. See *id.* at 34.

The Eleventh Circuit's position has also become unsettled, having been called into question by *Community State Bank* v. *Strong*, 485 F.3d 597 (11th Cir.), reh'g en banc granted, No. 06-11582, 2007 WL 4111380 (11th Cir. Sept. 10, 2007). There, a three-judge panel, applying the look-through rule announced in *Tamiami Partners*, held that the federal court had "arising under" jurisdiction over a Section 4 petition brought by several payday lenders and an associated bank because one of the issues to be arbitrated was federal in character. *Id.* at 612-613. But two judges, including Judge Marcus, the main opinion's author, emphasized that they applied the look-through rule only because they were bound to do so by circuit precedent. *Id.* at 613-614 (Marcus, J., concurring). They added a lengthy concurring opinion, expressing the view that the look-through rule is "wrong, or at the very least ill-considered" and that the issue was "ripe for * * * certiorari review." *Id.* at 614-615. In this opinion, Judge Marcus carefully considered—and rejected—each of the arguments advanced by the Fourth Circuit in support of the look-through approach. See *id.* at 625-634.

Nor have the courts on the other side of the conflict been immune from confusion and

uncertainty. Although, as noted above, *Prudential-Bache*, which rejected the look-through rule, remains the law of that Circuit, a later panel decision (apparently unaware of that precedent, which was not cited by either party) took the jurisdiction-expanding approach to Section 4 laid out in *Vaden*. See *Rio Grande Underwriters, Inc.* v. *Pitts Farms, Inc.*, 276 F.3d 683, 685 (5th Cir. 2001) (positing that orders compelling arbitration are "available in federal district court * * * only if the court would have had subject matter jurisdiction over the underlying civil action"). That decision held subject matter jurisdiction lacking (on the ground that the issue to be arbitrated was one of state law), but at least one court of that circuit has relied upon it to find look-through jurisdiction, see *Ellison* v. *Fannie Mae*, No. 3:05-CV-1155-G, 2007 WL 2089368, at *2 (N.D. Tex. July 23, 2007) (applying *Rio Grande* to uphold federal jurisdiction on the basis of a federal question in the underlying dispute, without discussing *Prudential-Bache*), even as others have continued to recognize *Prudential-Bache* as the governing precedent, see, *e.g.*, *CitiFinancial, Inc.* v. *Murray*, 340 F. Supp. 2d 743, 748 (S.D. Miss. 2004) (noting that *Prudential-Bache* establishes that "jurisdiction for a petition to compel arbitration must be determined from the face of the petition" and finding jurisdiction on the basis of diversity, without discussing *Rio Grande*).[6]

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[6] The Ninth Circuit provides further confirmation of the currency of the issue and the need for this Court's intervention. Although it specifically reserved the question (because it was not argued by the parties), that court has "recognize[d] that there is a substantial body of case law which holds that the existence of a federal question in the underlying dispute is not sufficient to create subject matter

B. The Fourth Circuit's Look-Through Rule Conflicts With Basic Principles Of Federal Subject Matter Jurisdiction And Impermissibly Privileges Arbitration Agreements

Beyond conflicting with the decisions of four other circuits, the Fourth Circuit's look-through approach is also wrong on the merits. By departing from the well-pleaded complaint rule, the look-through approach privileges arbitration agreements over other state-law contracts and requires costly and time-consuming litigation over the threshold issue of subject matter jurisdiction—even though providing a federal forum advances no federal interest. These incongruous results are in no way required by a proper reading of Section 4.

1. As a number of courts have explained, the Fourth Circuit's decision to base jurisdiction on the character of the issue whose arbitration the Section 4 petitioner seeks to compel flouts the rule that "has long governed whether a case 'arises under' federal law for purposes of § 1331," *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830

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jurisdiction over a petition to compel arbitration." *Blue Cross of Cal.* v. *Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1050 n.5 (9th Cir. 1999). It recently agreed to address the issue it expressly left undecided in *Blue Cross* by granting interlocutory appeal after a district court had noted "that there is a substantial circuit split" on this issue and certified its order upholding jurisdiction over 70 freestanding Section 4 petitions on that basis. *In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M:06-cv-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007), interlocutory appeal granted, No. 07-80046 (9th Cir. July 24, 2007).

(2002), that statutory "arising under" jurisdiction is to be determined by reference to the well-pleaded allegations of the complaint. See *Westmoreland*, 100 F.3d at 269; *Prudential-Bache*, 966 F.2d at 988; see also *Strong*, 485 F.3d at 635 (Marcus, J., concurring). "[A] § 4 petitioner merely asks the court to specifically enforce a contract," the parties' arbitration agreement. *Strong*, 485 F.3d at 618; cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964) ("The duty to arbitrate [is] of contractual origin."). Because the Section 4 petitioner's cause of action is a creature of the parties' arbitration agreement (generally arising out of state law) and the federal court's role is limited to determining whether a contractual obligation exists and has been violated, the nature of the underlying dispute (*i.e.*, issues the petitioner does not ask the federal court to decide and, in fact, claims it cannot decide) is irrelevant to the suit and is not part of the well-pleaded complaint. By nonetheless providing a federal forum for a petition to enforce a state-law arbitration agreement, the Fourth Circuit's look-through rule distorts basic jurisdictional rules and impermissibly privileges arbitration. It is fundamentally inconsistent with the FAA's aim of placing arbitration agreements on equal footing, *i.e.*, making them "as enforceable as other contracts, *but not more so*." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added).

Nor are any of the interests animating the statutory grant of federal question jurisdiction advanced by providing a forum for Section 4 suits whenever a party seeks to compel arbitration of an

issue that is federal in character.[7] The interests in uniform or expert interpretation of federal law are not advanced or even implicated by having federal courts adjudicate suits that resolve only whether particular parties actually agreed to arbitrate a particular question (the only provision of federal law that the Section 4 petitioner asks the court to interpret—the FAA—has been expressly held *not* to supply federal jurisdiction, *Moses H. Cone*, 460 U.S. at 25 n.32). Indeed, this illustrates why the Fourth

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[7] Facing this absence of a federal interest to support its decision, the Fourth Circuit attempted to fashion one by referencing this Court's statements that Congress has declared "a liberal federal policy favoring arbitration agreements," App., *infra*, 70a (quoting *Moses H. Cone*, 460 U.S. at 24); that "as a matter of federal law, any doubts concerning the scope of arbitratible [sic] issues should be resolved in favor of arbitration," *ibid.* (quoting, ultimately, *Moses H. Cone*, 460 U.S. at 24-25); and that the FAA "plac[es] arbitration agreements upon the same footing as other contracts," *id.* at 71a (alteration in original) (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). But each step is unavailing. The liberal policy favoring arbitration and the concomitant obligation to err in favor of arbitration apply once a federal court has taken jurisdiction and must decide which issues to send to arbitration. Such a thumb on the scale when deciding whether jurisdiction exists, however, would be inconsistent with the federal courts' role as courts of limited jurisdiction. See *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Strong*, 485 F.3d at 628 (Marcus, J., concurring). Similarly, because "[a]ctions to specifically enforce contracts, generally speaking, do not raise federal questions," the "equal footing" policy is disserved by holding that "an otherwise ordinary contract enforcement action raises a federal question on the basis of some other cause of action that may be brought before an arbitrator." *Ibid.*

Circuit's analogy to declaratory judgments, App, *infra*, 68a-70a, is fundamentally inapt: to the extent that the well-pleaded complaint rule is relaxed for such actions, it is precisely because the question the federal court is asked to decide is undeniably one of federal law. Moreover, an expansion of federal jurisdiction cannot be justified by any perceived hostility to federal claims on the part of state courts, because—if a federal forum is denied—the disappointed Section 4 petitioner's alternative would not be to have a state court decide the federal issue, but would instead be to ask the state court to have *someone else*—the arbitrator—decide the claim. [8]

Even worse, the look-through approach also promises to produce wasteful litigation on the threshold question of subject matter jurisdiction and to introduce friction between state and federal courts, concerns rendered all the more pressing "in view of Congress's clear intent * * * to move the parties to an arbitrable dispute out of court and into arbitration as quickly and as easily as possible." *Moses H. Cone*, 460 U.S. at 22. In this case, for example, five

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[8] Nor can the rule be understood as premised on state courts' presumed hostility to arbitration. That would be a profoundly ahistorical view of the FAA—which was an effort to bring federal courts into line with state practice—and it would prove far too much, as the Fourth Circuit's rule only extends federal jurisdiction to petitions in which the underlying dispute contains a federal question. There is no reason to think that a state court would be more (or less) hostile to arbitration in these cases, so any hostility to arbitration in the state courts would thus argue for federal jurisdiction to enforce *all* arbitration agreements, a result that is incompatible with the FAA's acknowledged requirement of an independent basis for federal jurisdiction.

different federal judges have considered jurisdiction in five separate opinions over four years of litigation, and the joint appendix in *Vaden II* ran some 846 pages. The Fourth Circuit was forced to examine complex, fact-intensive issues that closely track the merits of the underlying dispute, such as whether Ms. Vaden's state-law claims were completely preempted, see App., *infra*, 18a-25a, and whether Discover Bank was a "real party in interest" in the underlying state-court suit, see *id.* at 12a-18a. "An interpretation of the FAA that requires the district court to strongly suggest an answer to the merits of the parties' underlying dispute"—at great cost to the litigants and the courts—"merely as a means of determining whether it has subject matter jurisdiction to enforce a contractual agreement to send that dispute to the *arbitrator* for resolution, can only be described as odd." *Strong*, 485 F.3d at 634 (Marcus, J., concurring).

2. Of course, this surpassingly "odd" result would be unavoidable if Congress had clearly intended Section 4 to expand federal courts' subject matter jurisdiction. But it did not. The text, structure, and history of Section 4 establish that, like a number of other provisions of the FAA, it was enacted to address questions of remedy and procedure for arbitration disputes arising in cases that independently cleared the subject-matter-jurisdiction threshold, not to create subject matter jurisdiction—and the textual clues identified by *Vaden I* hardly compel a contrary result.[9]

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[9] Congress unmistakably knows how to overturn the well-pleaded complaint rule when it intends to do so, as it did in

Contrary to the Fourth Circuit's argument, the well-pleaded petition rule does not "rewrite the statute" by "[s]iphoning off federal question jurisdiction from Title 28." App., *infra*, 66a. Rather, under the well-pleaded petition rule, federal jurisdiction over a petition to compel arbitration can be based on a number of sources, such as diversity of citizenship, see 28 U.S.C. § 1332; admiralty, see *id.* § 1333, when the arbitration clause at issue is part of a maritime contract; or supplemental jurisdiction, see *id.* § 1367, when a party brings a federal cause of action so that the state-law claim to compel arbitration is within the court's pendent claim jurisdiction. See *Strong*, 485 F.3d at 626-627 (Marcus, J., concurring). Indeed, an action to compel arbitration can also state a federal question sufficient to confer jurisdiction under 28 U.S.C. § 1331 "when the agreement to arbitrate itself arises under federal law," such as employee benefit agreements under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* *Strong*, 485 F.3d at 627 (Marcus, J., concurring). It is thus "altogether natural for Congress to have referred to Title 28 generally, rather than to its various independent components." *Ibid.*

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expanding federal jurisdiction over arbitration cases under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201 *et seq.* See *id.* § 203 (providing that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States"); *id.* § 205 (providing that the well-pleaded complaint rule does not apply to removal of suits relating to an arbitration agreement or award governed by the Convention).

Similarly, Section 4's reference to "the controversy between the parties" does not mean that Congress intended the federal courts to mine "the overall substantive conflict between the parties," App., *infra*, 66a, to find a federal question. In explaining its rule, the Fourth Circuit suggested that "[l]itigants do not come to court solely to resolve the collateral issue of whether or not they have an agreement to arbitrate." *Ibid.* But, in fact, a party petitioning to compel arbitration under Section 4 does exactly that. The sole issue presented by a petition to compel is whether an arbitration agreement exists—the federal court *is not asked* to decide the parties' "real-life conflict[]," *ibid.*, and, indeed, it is precluded from doing so, cf. *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649-650 (1986).

Nor does Section 4's "save for such agreement" language require the Fourth Circuit's jurisdiction-expanding rule. As noted above, a number of courts have concluded that the "save for such agreement" language carries independent significance without requiring federal courts to resolve disputes that do not plead—or even present—any important federal question. See, *e.g.*, *Prudential-Bache*, 966 F.2d at 987-989; *Westmoreland*, 100 F.3d at 268; *Strong*, 485 F.3d at 632-633 (Marcus, J., concurring). Consistent with the statute's overall aims, the language can be read as clearing the way for a particular kind of suit—one that seeks only specific performance of an agreement to arbitrate—that federal courts would have previously refused to entertain. See, *e.g.*, *Atlantic Fruit Co.* v. *Red Cross Line*, 5 F.2d 218, 220-221 (2d Cir. 1924). Indeed, such an understanding of Section 4 has the virtue of not only historical accuracy but also coherence. It brings the provision

into alignment with the other provisions of the FAA with which it was enacted.

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In sum, the decision below reflects a split between, on the one hand, three circuits that permit look-through jurisdiction and, on the other, four that hold that such jurisdiction violates 28 U.S.C. § 1331. The confusion in the lower courts, moreover, extends far beyond this circuit split. The rule adopted below also impermissibly privileges arbitration agreements and leads to wasteful litigation on the threshold question of subject matter jurisdiction, frustrating Congress's intent to create a system that efficiently enforces arbitration agreements on an even footing with other contracts—all in the absence of any countervailing federal interest to justify the distortion of long-standing jurisdictional principles. This Court's review is necessary to resolve the split and ease the confusion in the lower courts.

II. The Second Decision Below Conflicts With This Court's Decision In *Holmes Group* And The Fundamental Principles Of Federal Jurisdiction On Which It Rests While Distorting The FAA's Fundamental Purpose

Having rejected the well-pleaded petition rule, the Fourth Circuit instructed the lower court to determine whether the underlying dispute presented a federal question. App., *infra*, 73a. On remand, the lower court held that Ms. Vaden's state-law counterclaims provided federal question jurisdiction over the case because they were "completely

preempt[ed]"—a ruling the Fourth Circuit affirmed in *Vaden II*. *Id.* at 28a, 48a.

Even if it were appropriate to tie a federal court's jurisdiction over a Section 4 petition to whether it would have had jurisdiction over a suit on the underlying dispute (and it is not, see pp. 19-26, *supra*), *Vaden II* would still work an unwarranted expansion of federal jurisdiction. *Vaden I*, by its terms, instructs a federal court to look through the petition and ask whether "subject matter jurisdiction over the case would otherwise exist by virtue of a properly invoked federal question in the underlying dispute," App., *infra*, 29a, *i.e.*, whether the federal court would have jurisdiction in the absence of the arbitration agreement. Here, however, the Fourth Circuit looked to Ms. Vaden's state-court *counter*claims, which, as this Court's decision in *Holmes Group* makes clear, could not supply jurisdiction over the underlying dispute. Thus unmoored from basic jurisdictional rules (and the clarity that they bring), *Vaden II* plucked (part of) a state-court dispute into a federal court that it otherwise could never have reached, leading to inefficient, piecemeal litigation and further privileging arbitration agreements over other contractual obligations. In addition to illustrating the problems posed by the Fourth Circuit's wrong turn in *Vaden I*, *Vaden II* is also independently wrong and therefore worthy of this Court's review.

Valid federal question jurisdiction requires that a federal issue be present on the face of the plaintiff's well-pleaded complaint, *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152-154 (1908), a rule this Court reaffirmed in *Holmes Group*, 535 U.S. at 830.

There, the Court rejected the argument "that the well-pleaded-complaint rule, properly understood, allows a counterclaim to serve as the basis for a district court's 'arising under' jurisdiction." *Id.* at 830. Allowing counterclaims to establish "arising under" jurisdiction, *Holmes Group* explained, would "contravene the * * * policies underlying [this Court's] precedents," *id.* at 831, and "transform the longstanding well-pleaded-complaint rule into the 'well-pleaded-complaint-*or-counterclaim* rule,'" *id.* at 832.

Holmes Group thus made clear that the well-pleaded complaint rule does not permit a court to base federal question jurisdiction solely on a *counterclaim* arising under federal law. The result reached by the majority in *Vaden II*, however, makes an end run around this well-established rule. DFS's complaint in the underlying dispute presents no issue of federal law, App., *infra*, 59a, and diversity jurisdiction is not present in this case, *id.* at 8a n.2. Rather, as the dissenting judge noted below, "federal jurisdiction is purportedly based upon defendant's state court *counterclaim* alleging illegal late fees and interest rates." *Id.* at 32a. Because no independent basis for federal jurisdiction exists on the face of DFS's state-court complaint, this case should have been resolved by a routine application of *Holmes Group*. But rather than ask whether federal jurisdiction was present in the underlying state-court case, the majority—relying on the supposed "unique procedural posture" created by petitions to compel arbitration, *id.* at 8a n.3—seemed content to find a

federal issue *anywhere* in the underlying dispute. See *ibid.*[10]

This reliance on state-law *counterclaims* for arising under jurisdiction undermines the policies served by the well-pleaded complaint rule. Under the majority's rule, the plaintiff can force piecemeal, inefficient litigation of a dispute in different court systems. When, as here, a defendant in a state-court suit asserts a purportedly completely preempted state-law counterclaim arguably subject to arbitration, the plaintiff can force litigation over its arbitrability into the federal court system, thereby

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[10] The majority's conclusion that Ms. Vaden's counterclaims were completely preempted provides no support for this free-ranging inquiry into her counterclaims in search of a federal question, contrary to the majority's apparent suggestion, App., *infra*, 9a, 10a & n.4. The complete preemption doctrine recharacterizes as federal claims those that—though purportedly based on state law—necessarily sound in federal law. *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 393 (1987). But because, as *Holmes Group* makes clear, counterclaims that *expressly* arise under federal law cannot supply federal question jurisdiction, it follows *a fortiori* that counterclaims recharacterized as federal by the complete preemption doctrine cannot supply such jurisdiction. Indeed, prior to *Vaden II*, every federal court to have addressed the issue had concluded that a completely preempted state-law counterclaim cannot confer federal question jurisdiction. See, *e.g.*, *Aetna Health* v. *Kirshner*, 415 F. Supp. 2d 109, 114 (D. Conn. 2006) (seeing "no reason why the well-pleaded complaint rule should apply differently to a counterclaim allegedly preempted by ERISA"); *Cross Country Bank* v. *McGraw*, 321 F. Supp. 2d 816, 821 (S.D. W. Va. 2004) ("[N]either the Supreme Court nor any other court * * * has expanded the complete preemption doctrine to include claims stated for the first time in a responsive pleading filed by a defendant.").

suspending state proceedings and requiring the federal courts to consider aspects of the dispute the state courts may have already evaluated. Also, as a result of *Vaden II*, the well-pleaded complaint rule no longer operates as a "'quick rule of thumb' for resolving jurisdictional conflicts." *Holmes Group*, 535 U.S. at 832 (quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 11 (1983)). Courts asked to compel arbitration will be unable to efficiently discern whether arising under jurisdiction exists solely by reference to the plaintiff's complaint. Instead, within the Fourth Circuit, they must examine responsive pleadings and often determine complex legal and factual issues, a practice that plainly "undermine[s] the clarity and ease of administration of the well-pleaded complaint doctrine." *Id.* at 832. And what is more, these difficulties (and those posed by *Vaden I*, see pp. 19-23, *supra*) would arise in an expanded number of cases—after all, many more cases involve federal issues at some point (and therefore can reach federal court through a petition to compel arbitration under *Vaden II*) than present a federal issue on the face of the plaintiff's complaint. Expanding federal jurisdiction in this manner would, in effect, "radically expand the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments'" that this Court's cases mandate, *Holmes Group*, 535 U.S. at 832 (alteration in original) (quoting *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 109 (1941)).[11]

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[11] Indeed, the arguments against federal subject matter jurisdiction here go far beyond those supporting the decision in *Holmes Group*, which involved the allocation of

By extending the complete preemption doctrine to counterclaims based on the "unique procedural posture," App., *infra*, 8a n.3., created by its own *sui generis* approach to arbitration agreements, *Vaden II* further privileges arbitration disputes over other state-law claims. *Vaden I*, for its part, instructs the federal courts to jettison traditional jurisdictional rules by looking through the pleading filed in federal court to examine the underlying dispute between the parties. *Vaden II* goes even further, instructing the federal courts to ignore these traditional rules once more as they examine the underlying dispute, permitting them to ground jurisdiction on any federal issue they find, even one that could not otherwise have brought the dispute to federal court. Expanding federal jurisdiction to include suits to enforce an arbitration obligation even when the underlying dispute could never have reached federal court thus creates a second layer of privilege that is even more fundamentally inconsistent with the FAA's basic premise that arbitration agreements are "as enforceable as other contracts, *but not more so*." *Prima Paint*, 388 U.S. at 404 n.12 (emphasis added).

And finally, as a practical matter, *Vaden II* compounds the potential for costly, complicated, and time-consuming litigation that *Vaden I*'s look-through theory invites. The "unique procedural posture" created by looking through opens the door to novel jurisdictional theories, causing confusion and

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responsibility between two federal courts (the Federal Circuit and the regional courts of appeals). This case directly presents the federalism concerns that were muted in *Holmes Group* but which ordinarily drive limitations on federal subject matter jurisdiction.

instability for parties pursuing an arbitration remedy, as well as unnecessary burdens on the federal courts. Here, for example, Discover and Ms. Vaden have spent over four years litigating the threshold question of whether a federal court has the power to hear Discover's motion to compel, all in a case in which the federal court was not asked—nor authorized—to decide the merits of an underlying dispute that could never have reached the federal courts on its own. A great deal of wasted time and judicial resources would have been spared by correctly applying *Holmes Group* to the underlying dispute.

Because the majority's opinion in *Vaden II* greatly expands the reach of the federal courts in a manner contrary to binding precedent of this Court and the policies it promotes, while further privileging arbitration disputes over other state-law disputes and contributing to wasteful litigation, certiorari should be granted with respect to the second question presented.

III. This Case Presents An Issue Of Substantial Importance For Federal And State Courts And Arbitration Cases Nationwide Through A Particularly Strong Vehicle—One That Poses Two Central And Interconnected Jurisdictional Questions

Allowing look-through jurisdiction under Section 4 of the FAA will affect many arbitration cases nationwide with potentially substantial systemic consequences for the federal courts. Expanding federal question jurisdiction in this way provides an additional means for parties to compel arbitration

under state-law arbitration agreements at the great expense of increasing the number of state-law contract cases in federal court. Most federal courts of appeals and district courts reject look-through jurisdiction for good reason: By giving parties the additional option to compel arbitration in federal court, it threatens to dramatically expand the federal docket and trample on state courts' rights to develop their own substantive law of contract enforcement.

The sheer number of cases arbitrated each year previews the impact look-through jurisdiction could have on federal courts. The Arbitration Administration Association (AAA), for example, just one of many alternative dispute resolution providers in the United States, reported approximately 142,000 cases filed with it in 2005.[12] To put this number in context, the number of cases the AAA alone processed was one third of the number of *total* cases filed in federal district court (330,721) and more than double the number of cases filed in federal circuit court (68,473) for roughly the same time period.[13] The AAA's consumer cases from California alone totaled 13,712 from January 2003 through September 2007,[14] and the Financial Industry Regulatory Authority

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[12] Letter and Financial Statements from William K. State II, President, American Arbitration Association 8 (2005), http://www.adr.org/si.asp?id=4301.

[13] Federal Court Management Statistics, 2005 Judicial Caseload Profile, http://www.uscourts.gov/cgi-bin/cmsd2005.pl (district courts), http://www.uscourts.gov/cgi-bin/cmsa2005.pl (courts of appeals) (click on "Generate" option) (capturing filings on a 12-month cycle ending September 30).

[14] American Arbitration Association, *CCP Section 1281.96 Data Collection Requirements*, http://www.adr.org/si.asp?id=4702 (last visited Dec. 1, 2007).

(FINRA), operator of one of the largest securities dispute resolution services in the world—an area of law in which federal questions pervade—reported 2,642 new arbitration cases filed just from January through October 2007.[15] With the option of look-through jurisdiction, parties in at least some of these cases could now first petition federal courts to enforce their state-law arbitration agreements.

As these numbers suggest, look-through jurisdiction could absorb significant federal court resources. Not only would more cases be filed in federal court, but parties would have to litigate and federal courts determine whether the underlying dispute actually raised a federal question. This can be difficult and time-consuming. See pp. 22-23, *supra*. This Court clearly recognized the danger complicated jurisdictional questions pose in *Holmes Group*, where it noted the well-pleaded complaint rule's essential role "as a 'quick rule of thumb' for resolving jurisdictional conflicts." *Holmes Group*, 535 U.S. at 832 (quoting *Franchise Tax Bd.*, 463 U.S. at 11). With the well-pleaded complaint rule comes "clarity and ease" in resolving jurisdictional questions. *Ibid.*

By granting this petition, the Court has the opportunity to cabin this expansion of federal question jurisdiction through a strong vehicle—one that presents two important and interconnected jurisdictional questions in the context of one concrete dispute. Resolving the propriety of look-through jurisdiction is alone sufficient reason to grant

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[15] FINRA, *Dispute Resolution Statistics*, http://www.finra.org/ArbitrationMediation/FINRADisputeResolution/Statistics/index.htm (last visited Dec. 1, 2007).

certiorari in this case, considering the conflict among the circuits and its implications for the FAA. The combination of *Vaden I* and *II*, however, makes this case even more important to resolve. Allowing a court to look through an arbitration agreement to the underlying dispute only begs the question: How far can the court look? As in *Vaden II*, courts asked to compel arbitration will be forced to consider what aspects of the underlying dispute are relevant to determining federal question jurisdiction. This case presents both of these logically related issues: whether a federal court asked to compel arbitration may look through to the underlying dispute to determine jurisdiction *and, if so*, whether the court may premise jurisdiction on allegations contained in the defendant's responsive pleadings. The second of these issues follows directly from the first and both are present in this case, making it an ideal vehicle for resolving these jurisdictional questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2007

APPENDIX

APPENDIX A

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INCORPORATED,
Plaintiffs-Appellees,

v.

BETTY E. VADEN,
Defendant-Appellant,

v. No.06-1221

FEDERAL DEPOSIT INSURANCE CORPORATION,
Amicus Curiae.

JOHN R. KUCAN, JR.; TERRY COATES,
Amici Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William D. Quarles, Jr., District Judge.
(1:03-cv-3224-WDQ)

Argued: November 29, 2006

Decided: June 13, 2007

Before WILKINSON and DUNCAN, Circuit Judges, and Joseph R. GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Duncan wrote the majority opinion, in which Judge Wilkinson concurred. Judge Goodwin wrote a dissenting opinion.

COUNSEL

ARGUED: John Andrew Mattingly, Jr., BALDWIN, BRISCOE & MATTINGLY, CHTD., Lexington Park, Maryland, for Appellant. Martin C. Bryce, Jr., BALLARD, SPAHR, ANDREWS & INGERSOLL, Philadelphia, Pennsylvania, for Appellees. **ON BRIEF:** Joseph W. Hovermill, Matthew T. Wagman, John C. Celeste, MILES & STOCKBRIDGE, P.C., Baltimore, Maryland; Alan S. Kaplinsky, BALLARD, SPAHR, ANDREWS & INGERSOLL, Philadelphia, Pennsylvania, for Appellees. Sara A. Kelsey, General Counsel, Richard J. Osterman, Jr., Assistant General Counsel, Colleen J. Boles, Senior Counsel, Kathleen V. Gunning, Counsel, FEDERAL DEPOSIT INSURANCE CORPORATION, Arlington, Virginia, for Amicus Curiae Federal Deposit Insurance Corporation. F. Paul Bland, Jr., TRIAL LAWYERS FOR PUBLIC JUSTICE, Washington, D.C.; J. Jerome Hartzell, HARTZELL & WHITEMAN, L.L.P., Raleigh, North Carolina; Carlene McNulty, NORTH CAROLINA JUSTICE CENTER, Raleigh, North Carolina, for Amici Curiae John R. Kucan, Jr., and Terry Coates.

OPINION

DUNCAN, Circuit Judge:

For the second time, we hear an appeal in a dispute between Appellees Discover Bank and Discover Financial Services, Inc., a servicing affiliate of Discover Bank ("DFS," and, together with Discover Bank, "Discover"), and Appellant Betty E. Vaden ("Vaden"). This case arises from Vaden's failure to pay a credit card balance and DFS's resulting suit against her in state court. Vaden responded with several class-action counterclaims against DFS. Discover Bank then filed suit in federal district court under § 4 of the Federal Arbitration Act ("FAA"), seeking to compel arbitration of Vaden's counterclaims.

In the first appeal, we decided as a threshold matter that the federal courts possess subject matter jurisdiction under § 4 of the FAA if the underlying dispute presents a federal question. On remand, we directed the district court to decide whether such a federal question exists here. More specifically, we asked the district court to determine whether Discover Bank or DFS was the real party in interest with respect to Vaden's state court counterclaims. If Discover Bank were found to be the real party in interest, then the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1811 et seq., would be implicated because Discover Bank is a state-chartered, federally insured bank. In that event, we asked the district court to determine whether the

FDIA completely preempted Vaden's state law usury claims. If the district court found that the claims were completely preempted and therefore a federal question existed, it then had to determine whether there was a genuine issue of material fact regarding the existence of an arbitration agreement between Vaden and Discover Bank.

The district court found that this case presented a federal question and accordingly denied Vaden's motion to dismiss for lack of subject-matter jurisdiction and stayed her state-court counterclaims pending arbitration. We agree that a federal question exists here and that the district court properly compelled arbitration. Therefore, we affirm.

I.

In 1990, Vaden obtained a Discover credit card. The card was issued by Discover Bank, a Delaware-chartered, federally insured bank. DFS is a servicing affiliate of Discover Bank. According to the servicing agreement between DFS and Discover Bank, DFS performs such functions as marketing and servicing Discover Bank loan products and collecting on accounts pursuant to instructions from Discover Bank. J.A. 531-38. In June 1999, Discover mailed Vaden a new Platinum Discover Card. Discover claims that Vaden's account was automatically converted to Platinum status at this time. Vaden's "Cardmember" statements, however, identified her as a regular Cardmember until September 1999. In July 1999, Discover mailed Vaden a "Notice of Amendment to Discover Platinum Cardmember Agreement" (the "Notice of Amendment"). J.A. 33.

This notice, which applied only to Platinum Cardmembers, included a provision requiring arbitration of disputes.

In July 2003, on behalf of Discover Bank, DFS sued Vaden in Maryland state court for nonpayment of a card balance in excess of $10,000. Vaden then filed class-action counterclaims based solely on Maryland law against DFS. These counterclaims include a breach-of-contract claim and claims that certain fees and interest rates were charged in violation of applicable Maryland statutes that regulate finance charges, late fees, and compounding of interest on consumer credit accounts. In that proceeding, DFS was identified as "Discover Financial Services, Inc. (Discover), SVC Affiliate of Discover Bank, F/K/A Greenwood Trust Co., a DE chartered state bank and issuer of the Discover Card."

Shortly after Vaden filed these counterclaims, Discover filed a petition in federal court seeking to compel arbitration of Vaden's state-court counterclaims based on the arbitration provision in the Notice of Amendment. Discover had made no previous requests to Vaden for arbitration. The district court granted Discover's motion to compel arbitration.

Vaden timely appealed and this court heard argument on that appeal in December 2004. In January 2005, we considered the issue of whether subject-matter jurisdiction existed. *See Discover Bank v. Vaden*, 396 F.3d 366, 367 (4th Cir. 2005) ("*Vaden I*"). We held in *Vaden I* that "when a party comes to

federal court seeking to compel arbitration, the presence of a federal question in the underlying dispute is sufficient to support subject-matter jurisdiction." *Id.* at 367. We declined to decide whether such an underlying federal question existed in this case. *Id.* On remand, we directed the district court to determine whether a federal question existed and guided it to examine whether Discover Bank was the real party in interest with respect to Vaden's state-court claims and whether these claims were completely preempted by the FDIA.[1]

Answering these questions, the district court found that Discover Bank was the real party in interest and that Vaden's state court usury claims were completely preempted. Also, the district court found that there was no issue of material fact regarding the existence of an arbitration agreement between Vaden and Discover Bank, and accordingly granted Discover's request for arbitration.

Vaden again timely appealed the district court's ruling, which appeal is before us now. Vaden argues that DFS is the real party of interest, and thus the FDIA is not implicated and the federal court is without subject-matter jurisdiction over the dispute. Vaden also contends that compelling arbitration was improper for two reasons: (1) Discover lacks standing because it failed to satisfy the relevant statutory requirements for compelling arbitration, and (2) there was not a valid arbitration agreement between Vaden and Discover Bank.

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[1]Much of the dissent's discussion explicates its dissatisfaction with *Vaden I*. The holding in *Vaden I* is, of course, the law of the case, and beyond the reach of this appeal.

II.

We turn first to the question of whether the federal courts have subject-matter jurisdiction over Discover Bank's § 4 petition for arbitration under the FAA.

Under § 4 of the FAA, a district court may issue an order compelling arbitration if the court would otherwise "have jurisdiction under Title 28, in a civil action . . . *of the subject matter of a suit arising out of the controversy* between the parties." 9 U.S.C. § 4 (2000) (emphasis added). Section 4 does not require a party to actually file suit regarding the underlying controversy; the FAA requires only that a party be aggrieved by another party's failure to arbitrate a controversy, "the subject matter of which would fall within the jurisdiction of this Court, were an actual suit to arise out of the controversy." *Reynolds & Reynolds Co. v. Image Software, Inc.*, 254 F. Supp. 2d 761, 765 (S.D. Ohio 2003); *see Vaden I*, 396 F.3d at 369 ("We thus hold that a federal court possesses subject-matter jurisdiction over a case when the controversy underlying the arbitration agreement presents a federal question."); *id.* at 370 ("The text of § 4 requires us to consider jurisdiction as it arises out of the whole controversy between the parties."); *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999) (suggesting that "it is appropriate to look through the arbitration request to assess whether the underlying dispute between the parties is grounded in federal law). Thus, a § 4 petition to compel arbitration is properly in federal court if the underlying dispute presents a federal

question.[2] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); *Vaden I*, 396 F.3d at 367. A court must therefore look through the arbitration claim and examine the underlying state-court action. The Supreme Court has explained that even when a complaint alleges only violations of state law, the case may nevertheless center on a federal question, and therefore be removable,[3] if

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[2]Were diversity jurisdiction to exist, this alone would be sufficient to confer federal jurisdiction. Here, however, diversity jurisdiction is not present. *See* 28 U.S.C. § 1332.

[3]The dissent argues that complete preemption is purely a removal doctrine and therefore that we improperly invoke it upon the unique procedural posture of this case. Although complete preemption did originate in the removal context, we conclude that it also applies to the unique procedural posture of this case. Complete preemption creates an exception to the well-pleaded complaint rule: "On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). The doctrine, therefore, does not flow from the procedural act of removal, but from the dominance of federal law over the preempted state law. Thus, it is not a logical leap to apply this principle to the instant case. To hold otherwise would have the perverse result of returning to state court otherwise completely preempted federal claims because of the unanticipated nature of a defendant's counterclaims.

Moreover, the question of whether complete preemption is a "removal doctrine," *see* Dissenting Op. at 20, is irrelevant. The point is simply whether Discover Bank's arbitration petition presents a federal question. *See* 9 U.S.C. § 4 (2000) (district court may order arbitration if the court

federal law completely preempts the state law claims. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). This is the "complete preemption doctrine." *Id.* *Caterpillar* explains that "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.*

Complete preemption is an exception to the well-pleaded complaint rule. Although generally a case may not "be removed to federal court solely because of a defense or counterclaim arising under federal law," *Topeka Hous. Auth. v. Johnson*, 404 F.3d 1245, 1247 (10th Cir. 2005), *complete* preemption is an exception to this rule and so federal jurisdiction is proper, even though the preemption is only raised as a defense. *See Caterpillar*, 482 U.S. at 393; *see also Topeka Hous. Auth.*, 404 F.3d at 1247 (noting that complete preemption is an exception to the general rule barring removal based on counterclaims) (citing 14B Charles Alan Wright, Arthur R. Miller & Edward

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would otherwise "have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties."). We held as much in *Vaden I*, stating "the plain text of § 4 requires us to ask whether any basis for subject matter jurisdiction would exist for the case in the absence of the arbitration agreement," *Discover Bank v. Vaden (Vaden I)*, 396 F.3d 366, 373 (4th Cir. 2005), and holding "the presence of a federal question in the underlying dispute is sufficient to support subject-matter jurisdiction," *id.* at 367. The *Vaden I* panel was unanimous on this point, and other courts have also refused to unduly restrict federal jurisdiction over Section 4 petitions. *See, e.g., Tamiami Partners, Ltd. v. Miccosukee Tribe*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999).

H. Cooper, *Federal Practice & Procedure* § 3722.1, at 508 (3d ed. 1998)).[4]

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[4]The Supreme Court's holding in *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002), relied upon by Vaden and cited by the dissent, is not to the contrary. The Court reaffirmed "the principle that federal jurisdiction generally exists 'only when a federal question is presented on the face of the [plaintiff's] properly pleaded complaint.'" *Id.* at 831 (quoting *Caterpillar*, 482 U.S. at 392). *Holmes Group* did not, however, involve complete preemption. Moreover, the Court grounded its holding in policies underlying the well-pleaded complaint rule, noting that, under the federal patent statute at issue in that case, federal jurisdiction could not obtain based solely upon defendant's answer. *Id.* at 831. In complete preemption cases, however, "claims are so 'necessarily federal' that they will always permit removal to federal court, even if they are raised only by way of defense." Wright, Miller, & Cooper, *supra*, § 3722.1 at 508. As such, "the complete-preemption doctrine overrides such fundamental cornerstones of federal subject-matter jurisdiction as the well-pleaded complaint rule and the principle that the plaintiff is master of the complaint." *Id.*

The *Holmes* court was also concerned about allowing a defendant to evade a plaintiff's choice of state forum and the well-pleaded complaint rule by asserting federal counterclaims: this is the *opposite* of the facts here. In this case, the only claims advanced by Vaden's counterclaims purport to be state law claims. There is no danger that defendant Vaden might frustrate plaintiff Discover Bank's choice of state forum. To the contrary, it is Discover who filed the arbitration complaint in federal court and Vaden who is resisting federal jurisdiction.

Moreover, the whole point of the complete preemption doctrine is that plaintiff's choice of forum is not given preference, but must instead yield to Congress' intent that some claims, even those cloaked in state-law trappigs [sic], are really federal causes of action. In this, complete

In misapprehending that complete preemption is a narrow exception to the general rule that federal jurisdiction must appear on the face of the complaint, the dissent fails to appreciate the fundamental distinction between *complete* and *ordinary* preemption. Its interpretation would deny Discover Bank a federal forum even if Discover were a nationally—as opposed to state—chartered bank operating under a federal law the Supreme Court has expressly held to completely preempt state law. *See infra* Part II.B. The fallacy inherent in the dissent's view is patent: it would render the concept of complete preemption a nullity.

For subject-matter jurisdiction to exist in this case, then, two requirements must be satisfied: (1) a federal law other than the FAA must be invoked; and (2) said federal law must completely preempt the state law claims in question. The district court, at our direction, found that there was a federal question in the underlying dispute because Discover Bank was the real party in interest in the state-court proceedings, thereby implicating the FDIA, and that the FDIA completely preempted Vaden's state-court usury claims against Discover Bank. We now consider its determinations, discussing each in turn. We review questions of subject-matter jurisdiction de novo, *Lontz v. Tharp*, 413 F.3d 435, 438 (4th Cir. 2005).

A.

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preemption is an exception to the well-pleaded complaint rule: when complete preemption obtains, a plaintiff may not avoid a federal forum by asserting only state claims.

First, we look to whether a federal law is invoked by the underlying state court dispute. *See Caterpillar*, 482 U.S. at 393. To resolve this question we must answer another: whether Discover Bank, as opposed to DFS, is the real party in interest with respect to Vaden's counterclaims.[5] On the face of the pleadings, DFS, not Discover Bank, is the party to the state-court dispute. If Discover Bank is *not* the real party in interest with respect to the counterclaims, the FDIA does not apply because DFS is not a bank,[6] and

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[5]The dissent calls this inquiry an "unnecessary detour," citing Federal Rule of Civil Procedure 17(a). *See* Dissenting Op. at 23 n. 4. It is mistaken. To begin with, Discover Bank is not a defendant in the federal action, but a *petitioner* filing a "verified complaint in the nature of a petition to compel arbitration and enjoin defendant's prosecution of her state court counterclaim." In any case, as the FDIC's amicus brief demonstrates, courts must routinely determine whether a bank, rather than one of its business partners, may resort to the preemptive scope of the NBA or the FDIA. To avoid this analysis would allow a plaintiff to artfully plead state law claims against a non-bank defendant and thus frustrate Congress' intent that certain causes of action are always federal. *See, e.g., Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000) (finding complete preemption under National Bank Act although bank extending credit was not a party to the state court action). The real-party-in-interest analysis is also necessary to prevent a defendant from falsely asserting that it is a bank and thus preempting large swaths of state law which Congress did not intend to displace. *See, e.g., In re Community Bank of Northern Va.*, 418 F.3d 277, 297 (3d Cir. 2005) (finding complete preemption inapplicable because the loans at issue were made by a non-depository institution).

[6]It is uncontested that DFS is not a bank, state-chartered or otherwise, and therefore neither the National Banking Act nor the FDIA applies to it.

therefore the counterclaims implicate no federal law. The parties' styling of the pleadings does not control our analysis, however; we must decide whether Vaden's state-court counterclaims are really directed at Discover Bank rather than DFS. *See Vaden I*, 396 F.3d at 372 n.3. The district court found that Discover Bank was the real party of interest with respect to Vaden's counterclaims, and we agree.

One of our most fundamental procedural rules is that an action must be brought by the party that has the right to enforce the claim and has a significant interest in the litigation. *See Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973) (citing Fed. R. Civ. P. 17(a)). The identity of the "real" party may not always be apparent from the face of pleadings; it may be necessary to look beyond the pleadings to the facts of the dispute. *See Vaden I*, 396 F.3d at 373 n.3; *see also Phipps v. FDIC*, 417 F.3d 1006, 1011 (8th Cir. 2005) ("[W]e are required to look beyond the plaintiffs' artful attempts to characterize their claims to avoid federal jurisdiction."). Such is the case here.

The need to look carefully at the facts to determine the real party in interest is particularly compelling in this instance because of the unique and complex relationships among the parties through the various phases of this litigation.[7] The instant suit

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[7]At our request, the Federal Deposit Insurance Corporation submitted an amicus brief assessing the issue of whether Discover Bank was the real party in interest on these facts. We find its analysis of the record helpful in parsing the various agreements and documents that delineate the

began when DFS, identified as "Discover Financial Services, Inc. (Discover), SVC Affiliate of Discover Bank, F/K/A Greenwood Trust Co., a DE chartered state bank and issuer of the Discover Card," sued Vaden in Maryland state court for an unpaid credit card balance. Vaden counterclaimed against DFS, alleging damages based upon improper assessment of fees and interest charges: "[T]hus, her claims were directed against the entity that extended her credit, charged her interest and had a right to bring the collection action—the lender." Amicus Br., FDIC, at 2. Vaden would have us simply accept DFS as the lender, and thus real party in interest, and deny Discover Bank's role as originator of her Cardmember account. The facts, however, show that Discover Bank was the lender here and therefore the real party in interest.

There are several pieces of evidence we find instructive in construing the relationship between Vaden and Discover Bank. The Cardmember agreements issued to Vaden are of particular significance. These agreements conclusively demonstrate that Discover Bank was the entity that extended Vaden credit and set the interest and fees of which Vaden complains.[8] *See e.g.*, J.A. 26-27, 29-31, 206-07. The agreements allow Discover Bank to levy periodic finance charges and late fees, as well as to change the rate of finance charge with thirty days' notice. *Id.* In addition, the arbitration agreement in

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relationship among Discover Bank, DFS, and a cardmember such as Vaden.

[8]Some of these documents reference Greenwood Trust Company, which was Discover Bank's predecessor.

question was between Discover Bank and Vaden only, as they were the only two parties to the original Cardmember agreement. *See* J.A. 33-34, 499. The servicing agreement between Discover Bank and DFS also supports our finding that Discover Bank is the real party in interest here. That agreement provides that DFS will service certain Discover Bank "loan products," J.A. 531-38, and DFS must perform all marketing and collection services under instructions from Discover Bank, J.A. 532-33. One of the service activities DFS performed was mailing monthly bills to cardmembers. Nothing on the statements that DFS mailed to Vaden identified DFS as the lender. To the contrary, mailing billing statements is consistent with DFS's admitted role as a servicing agent. DFS also brings collection actions pursuant to the servicing agreement, as it did here in suing Vaden for her unpaid balance on Discover Bank's behalf. *See* J.A. 533.

In addition, as the FDIC points out, the servicing agreement specifies that:

> DFS will not be responsible for violations of federal or state law, including usury laws, fee restrictions or privacy laws, to the extent that DFS acts consistently with directions or supervision received from [Discover Bank] or its agents. . . . *[Discover Bank] will be solely responsible for establishing the annual percentage yields and rates, insurance premiums, and other charges and fees for its credit cards*, deposit accounts and other products and for ensuring that such yields, rates, premiums,

> charges or fees are in compliance with state and federal laws.

J.A. 531-32 (emphasis added). The agreement establishes a clear division of authority between DFS and Discover Bank, designating Discover Bank as the party in charge of setting the terms and conditions of lending money through its credit cards. DFS, although it could evaluate consumer credit applications, could only do so under guidelines set forth by Discover Bank. *Id.*

Importantly, the servicing agreement also provides that Discover Bank will indemnify DFS for any damages caused by Discover Bank. J.A. 536. This includes any potential judgment from Vaden's state court counterclaims against DFS. Discover Bank acknowledges that it would be bound by any judgment resulting from the state-court litigation, even though it was not officially a party to it, because DFS was acting on its behalf. Appellee's Br. at 24 n.7. Nor would DFS be permitted to keep any funds collected from a Cardmember in its own name: it must immediately deposit all such funds in Discover Bank's accounts. J.A. 534.

A final source of support for the conclusion that Discover Bank is the real party in interest is found in Discover Bank's financial statement and prospectuses for the sale of interests in credit card receivables through securitizations. Discover Bank's independently-audited financial statement explains that credit-card loans make up the majority of the bank's consumer loans and are assets of the bank. J.A. 511, 519. The bank's prospectuses identify

Discover Bank as the issuer of the Discover credit card and owner of the Discover Card account. J.A. 543, 619-622. These same prospectuses reaffirm Discover Bank's right to set the terms for essential aspects of a cardholder's account: the rate for periodic finance charges, late fees, credit limits, minimum monthly payments, credit-worthiness criteria, charge-off policies, and collection practices. J.A. 613, 619, 621, 623. Service and operating tasks are delegated to DFS. J.A. 620, 622.

This evidence notwithstanding, Vaden argues that DFS, and not Discover Bank, is the real party in interest with respect to her state-law counterclaims. She points to several items in the record for support, including the pleadings themselves, Morgan Stanley's Annual report on Discover, and press releases from DFS. In particular, Vaden proffers certain press releases stating that DFS operates the Discover Card brand as evidence that DFS is the real party in interest. The functions attributed to DFS in these press releases, however, are consistent with its role as a servicing entity and do not establish it as a lender. Importantly, Vaden herself does not contest the fact that it is Discover Bank and not DFS that set the interest rate on her account. None of these documents suggest that DFS operated as a lender or had any authority to alter or set vital terms of Vaden's Cardmember account. Moreover, these documents are secondary sources of information, rather than primary sources such as the servicing agreement and Discover Bank's prospectus. We are unpersuaded by Vaden's arguments, as we find the evidence she proffers to be consistent with the

conclusion that Discover Bank is the real party in interest.

On these facts, we hold that Discover Bank is the real party in interest with respect to Vaden's state court counterclaims. Because Discover Bank is a state-chartered, federally insured bank, the FDIA is implicated by these claims against the bank.[9]

B.

We turn next to the question of whether § 27 of the FDIA "completely preempts" state law usury claims against a state-chartered, federally insured bank that is the real party in interest of a state court dispute.[10]

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[9]In finding Discover Bank to be the real party in interest here, we emphasize the heavily fact-dependent nature of our analysis and its consequent parameters. Clearly, a state-chartered, federally insured bank will not always be the real party in interest for purposes of invoking the FDIA. For example, in *Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 718-19(E.D.N.C. 2002), a payday lender had "leased" an association with the Goleta National Bank in order to avoid state usury laws. The *Lingerfelt* court held that the non-bank payday lender, rather than Goleta National Bank, was the real lender and therefore the complete preemption doctrine did not apply. *Id.; see also Flowers v. EZPawn Okla., Inc.*, 308 F. Supp. 2d 1191, 1196 (N.D. Ok. 2003) (finding that EZPawn—not the affiliated bank—was the real lender and therefore no subject-matter jurisdiction existed). Such cases are distinguishable from the facts here.

[10]Because Vaden "conceded" that the FDIA completely preempted her state-law claims, the district court's analysis of this issue was cursory. We note, however, that a party

In interpreting any statute, we turn first to the text of the statute itself. Section 27(a) of the FDIA provides in part:

> In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates . . . such State bank[s] . . . may, *notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section*, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest . . . at the rate allowed by the laws of the State . . . where the bank is located.

12 U.S.C. § 1831d(a)(emphasis added). The statute's express preemption provision indicates that at the very least, Congress contemplated ordinary express preemption when drafting this statute.

However, to decide the more specific question of whether Congress intended *complete* preemption of state-court usury claims, as distinguished from ordinary express preemption, we look beyond the text, to Congress's intentions in enacting the statute. The legislative history of the FDIA is instructive in this regard. It tells us that Congress intended to "allow[] competitive equity among financial institutions, and reaffirm[] the principle that institutions offering similar products should be

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may not create jurisdiction by concession and thus address this issue directly.

subject to similar rules." 126 Cong. Rec. 6,908 (1980) (Statement of Sen. Bumpers). The FDIA was enacted in part to "provide[] parity, or competitive equality, between national banks and State chartered depository institutions. . . ." 126 Cong. Rec. 6,900 (1980) (Statement of Sen. Proxmire).

Keeping in mind the purpose underlying the FDIA's enactment, we turn to the question of whether Congress intended the FDIA to completely preempt state-law usury claims against state-chartered banks. Although this is an issue of first impression in this court, we are not wholly without guidance as far as federal banking laws are concerned. The Supreme Court has addressed the issue within the context of the National Bank Act ("NBA"), 12 U.S.C. §§ 1 et seq., which is to national banks as section 27 of the FDIA is to state-chartered banks.[11] In *Beneficial*, the Supreme Court held that the NBA completely preempts state-court usury claims against national banks. 539 U.S. at 11. The Court explained that "[b]ecause §§ 85 and 86 provide

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[11] The Supreme Court's recent decision of *Watters v. Wachovia* ___ U.S. ___, 127 S. Ct. 1559 (2007), is instructive, though not precisely on point. In *Watters*, the court held that a national bank's "mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary" is subject to federal, and not state, regulatory oversight. *Id.* at 11. Although neither the FDIA nor state court usury claims were at issue, the Court's holding did reaffirm the basic principle elucidated in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 11 (2003), that federal banking laws preempt state law. "[T]he States can exercise no control over national banks, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Watters*, 127 S.Ct. at 6.

the exclusive cause of action" for usury claims, there is "no such thing as a state-law claim of usury against a national bank." *Id.* As a result, even though the plaintiff's complaint did not mention federal law, his cause of action arose under federal law and defendant National Bank's removal to federal court based on complete preemption under the NBA was proper. *Id.* at 10-11.

One of our sister circuits has compared the NBA to the FDIA and found that both statutes completely preempt state-law usury claims.[12] The Third Circuit has held that the NBA and FDIA are interpreted in para materia and therefore the doctrine of complete preemption applies to the FDIA as well. In *In re Community Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005), the court found that Section 1831d(a) "completely preempts any state law attempting to limit the amount of interest and fees a federally insured, state-chartered bank can charge." Indeed, not only does the FDIA contain an express preemption clause—"notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section"—but it also "incorporates verbatim the language of § 85 of the NBA." *Id.* at 295. "When Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts ordinarily should be interpreted the same way." *Id.* at 295-96.

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[12]In contrast, one federal court has held that the FDIA does not contemplate complete preemption. *See Saxton v. Capital One Bank*, 392 F. Supp. 2d 772, 780-84 (S.D. Miss. 2005) (distinguishing *Beneficial Nat'l Bank* as being grounded in the federal interest that protects national banks from state taxation). For the reasons above, we disagree.

Therefore, complete preemption was held to apply to state usury claims against state-chartered, federally insured banks, just as it does to claims against national banks.

The First Circuit has also compared the NBA and FDIA, although not in the context of complete preemption. The dispute in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 821 (1st Cir. 1992), arose when the Commonwealth of Massachusetts notified Greenwood that its late-fee policy violated state law. Greenwood reacted to the threat of potential litigation from the state by filing for declaratory and injunctive relief in federal court on the grounds that the FDIA[13] expressly preempted state law usury claims. In assessing whether the FDIA *expressly*—not completely—preempted state usury laws, the court explained that Congress enacted the FDIA to level the playing field between national and state banks regarding the levying of interest rates. *Greenwood Trust*, 971 F.2d at 826. "The historical record clearly requires a court to read the parallel provisions of [the FDIA] and the Bank Act in pari materia." *Id.* (emphasis omitted).[14]

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[13]*Greenwood* refers to the FDIA as the "DIDA," but the statutory provision at issue is the same, 12 U.S.C. § 1831d(a). 971 F.2d at 827.

[14]There is one difference between the relevant provisions of the NBA and the FDIA that we must pause to consider. The NBA states that an action must be "commenced within two years from the time the usurious transaction occurred," 12 U.S.C. § 86, while the FDIA states that a person aggrieved "may recover in a civil action commenced *in a court of appropriate jurisdiction* not later than two years after the date of such payment." 12 U.S.C. § 1831d(b) (emphasis

We find the logic of our sister circuits compelling. We note as well that the FDIC further supports our finding of complete preemption.[15] The agency has "uniformly construed Section 1831d in pari materia with Sections 85 and 86 [of the NBA]." Amicus Br., FDIC, at 10 (emphasis omitted). "[U]nder Section 1831d(a), state banks were provided interest rate authority comparable to that of national banks. Interest charges include not only the numerical percentage rate assigned to a loan but also late payment fees, over the limit fees and other similar charges." *Id.* (citing 12 C.F.R. § 7.4001(a)) (footnote

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added). As both statutes speak to the creation of a federal cause of action, we do not read the phrase "a court of appropriate jurisdiction" as inconsistent with the complete preemption doctrine. Rather, we agree with the First Circuit that the differences in the statutes are an insufficient basis upon which to distinguish them: "[a]lthough there are niggling variations, the key phraseology is substantially identical." *Greenwood Trust*, 971 F.2d at 827. Indeed, it would be anomalous to interpret the inclusion of a general forum-selection provision such as the one in the FDIA as precluding complete preemption.

[15] The FDIC's interpretation of § 1831d is entitled to only limited deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1994). In its brief, the agency points to no regulation or other formal statement of its policy that was adopted with notice-and-comment rulemaking or through formal adjudication. Therefore, "we defer to the agency's interpretation only to the extent that the interpretation has the power to persuade." *U.S. Dep't of Labor v. N.C. Growers Ass'n*, 377 F.3d 345, 354 (4th Cir. 2004) (citing *Skidmore*, 323 U.S. at 134). We defer only to the extent that we are persuaded by the FDIC's interpretation. *See Skidmore*, 323 U.S. at 140.

omitted). In arguing that the FDIA completely preempts state-law usury claims, the FDIC relies on *Beneficial National Bank*, agreeing with the First and Third Circuits, that in § 1831d, "Congress created a federal cause of action that entirely replaced . . . the analogous area of state law." *Id.* at 13.

We find the analyses of the FDIC and our sister circuits persuasive. Given the express preemption language of the FDIA, the statute's legislative history affirming Congress' intent to provide competitive equality between national and state-chartered banks, the virtual identity of the preemption language in the NBA and that of the FDIA, and the Supreme Court's finding of complete preemption under the NBA, we are hard-pressed to conclude other than that Congress intended complete preemption of state-court usury claims under the FDIA. As the final step in our analysis, we turn to a consideration of whether Vaden's state law counterclaims fall into this completely preempted category.

Vaden's state court counterclaims challenge certain fees and interest rates charged on her Discover card account.[16] She argues that these fees

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[16]We recognize that not all of Vaden's claims fall into the state-court usury claim category. The scope of the arbitration agreement, however, subsumes all of Vaden's various counterclaims, including her breach of contract claims asserting fraud and violations of good faith and fair dealing as well as her claims of "unfair and deceptive trade practices." While those non-usury claims arguably fall outside the preemptive scope of the FDIA, *see Saxton v. Capital One Bank*, 392 F. Supp. 2d 772, 783 (S.D. Miss. 2005)

and interest rates were in violation of Maryland laws regulating finance charges, late fees, and compounding of interest on consumer credit accounts. *See* Md. Code Ann., Comm. Law §§ 12-502, -506, -506.2 (2005).[17] Vaden's complaints regarding the fees and interest charged on her cardmember account fall squarely within the FDIC's definition of "usury" charges. *See* 12 C.F.R. § 7.4001(a) (defining usury charges as the numerical periodic rate, late payment fees, overlimit fees, and other charges). We therefore conclude that Vaden's claims are completely preempted by the FDIA.[18] We emphasize again that our holding only extends so far as a state-chartered, federally insured bank is the real party of interest with respect to the preempted state-court claims.

III.

Lastly, we turn to the issue of whether an arbitration agreement binds Vaden and Discover Bank so as to make compelling arbitration proper.

(collecting cases), complete preemption of any one of Vaden's counterclaims should suffice to provide a federal forum under the complete preemption doctrine.

[17]In contrast, Delaware's commercial laws, governing Discover Bank, allow banks to charge late fees, interest, and compound interest according to the cardholder agreement. *See* Del. Code Ann. tit. 5, §§ 941(8), 943, 945, 950, 952 (2005).

[18]To find otherwise would undermine the statute's purpose, which is to provide state banks parity with national banks: if we found no complete preemption here, we would be treating state banks differently under the FDIA than national banks are treated under the NBA. Such a result clearly cuts against Congress's intentions in grafting language from the NBA to the FDIA.

Pursuant to our instructions in *Vaden I*, the district court also examined "whether there was a question of material fact about the existence of an arbitration agreement." 396 F.3d at 373 n. 4. Vaden appeals the district court's findings that an arbitration agreement existed between the parties and that her claims are subject to arbitration because she failed to opt out of that agreement. *Discover Bank v. Vaden*, 409 F. Supp. 2d 632, 639 (D. Md. 2006) (citing *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 634 (4th Cir. 2002), for the proposition that a "court must order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored"); *see* 9 U.S.C. § 4.

Significantly, under both Delaware and Maryland law, Vaden bears the burden of rebutting the presumption of receiving the arbitration agreement, which was included in a Notice of Amendment to the Cardmember agreement.[19] *See Graham v. Commercial Credit Co.*, 194 A.2d 863, 865 (Del. Ch. 1963) (holding "that mail which is properly addressed and posted . . . is presumed to be duly received by the addressee"); *Marsheck v. Bd. of Trustees of the Fire & Police Employee's Ret. Sys. of the City of Balt.*, 749 A.2d 774, 785 (2000) (explaining the presumption of receipt arising from proper mailing). Vaden's only evidence to support her claim that she did not receive it is her own statement that she did not, and mere denial is insufficient to rebut the presumption of receipt. We find no error in the district court's

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[19]We agree with the district court's conclusion that Discover satisfied the requirements for the presumption of receipt, as it provided unrebutted affidavits detailing the procedures and practices for mailing the Notice of Amendment.

analysis of this issue and so affirm based on the reasoning of the district court.[20]

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[20]Vaden also attempts to escape arbitration by arguing that Discover fails to satisfy the relevant statutory standing requirements for compelling arbitration. We cannot agree.

Intriguingly, the alleged defect in standing Vaden points to is her own failure to "unequivocally refuse" a request for arbitration. *See* Appellant's Br. at 43. The FAA, under which Discover brings suit, states that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for . . . arbitration." 9 U.S.C. § 4. Vaden contends that, because Discover did not request arbitration with her before filing suit, she never refused arbitration and therefore Discover is not "[a] party aggrieved by [her] failure . . . to arbitrate." *Id.* Accordingly, she argues, Discover has not met the requirement for filing a petition. *See* Appellant's Br. at 41-44. One sister circuit has held that an action to compel arbitration is proper when the party against whom the motion to compel is made has commenced litigation that is the subject matter of the parties' arbitration agreement. *See, e.g. PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1066 (3d Cir. 1995) (finding that an action to compel arbitration is proper when the other party refuses to arbitrate by "unambiguously manifesting an intention not to arbitrate the subject matter of the dispute").

Although Vaden did not initiate the original suit, she counterclaimed in state court and has litigated extensively—to the tune of not one, but two appeals before this court—to avoid arbitration of her claims. To agree with Vaden's arguments that she has not refused a request for arbitration in the meaning of the statute would create an absurd result: reversing a motion to compel arbitration against a party who argues that she never refused to arbitrate in the first place. Neither common sense nor precedent countenances such a result, and so we find no defect of standing here.

IV.

For the foregoing reasons, we affirm the district court's finding that Discover Bank is the real party in interest with respect to Vaden's state-court counterclaims, and we hold that the FDIA completely preempts state-court usury claims against a state-chartered, federally insured bank to the extent that the bank is the real party in interest with respect to those claims. We also affirm the district court's finding that there was no issue of material fact with respect to the existence of an arbitration agreement between Vaden and Discover and therefore affirm the district court's grant of Discover's motion to compel arbitration.

AFFIRMED

GOODWIN, District Judge, dissenting:

The district court and the majority inexplicably use the removal doctrine of complete preemption to recharacterize a *counterclaim* in a state court civil action as federal. From that process, they pluck an "independent" basis for federal subject matter jurisdiction to support this action to compel arbitration. As I find no independent basis for federal court jurisdiction exists, I respectfully dissent.

In *Vaden I*, the court heard an appeal from a case brought under the FAA, which did not have an independent jurisdictional basis on its face.[1] The

[1]It is well established that the FAA standing alone does not provide a basis for federal jurisdiction. *See Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *Moses H. Cone*

panel found that "[a] federal court may . . . hear a § 4 petition to compel arbitration if, but for the arbitration agreement, subject matter jurisdiction over the case would otherwise exist by virtue of a *properly invoked federal question* in the underlying dispute." *Discover Bank v. Vaden (Vaden I)*, 396 F.3d 366, 373 (4th Cir. 2005) (emphasis added). The court in *Vaden I* remanded the case to the district court with instructions to determine whether "such a federal question exists in this case." *See id.* at 373. The *Vaden I* panel hypothesized that Ms. Vaden's *counterclaims* alleging illegal interest rates and late fees might present issues of such substantial federal interest as to be, in effect, federal claims under the FDIA. *See Vaden I*, 396 F.3d at 373 n.3. The panel suggested to the district court that if it found that Discover Bank, "as opposed to merely Discover Financial Services, is a party of interest in the state law suit," then a federal question may be presented.[2]

Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction."). Therefore, before a district court may entertain a petition under the FAA, there must be an independent basis of jurisdiction. *Owens Ill., Inc. v. Meade*, 186 F.3d 435, 439-40 (4th Cir. 1999) ("Section 4 of the FAA confers jurisdiction in the district court over petitions to compel arbitration only to the extent that the federal court would otherwise have jurisdiction over the case. On that basis, this case must include another independent basis to establish federal jurisdiction.").

[2]I do not know what it is to be "a party of interest" in a lawsuit, and the panel in *Vaden I* gave no explanation. The

Id. at 373 n.3. Upon remand, the district court found that Discover Bank was the real party in interest with respect to the counterclaims and on that basis bootstrapped an additional party into the case to defend the counterclaims. *Discover Bank v. Vaden*, 409 F. Supp. 632, 637 (D. Md. 2006).

My disagreement with the majority opinion centers on its finding of "arising under" jurisdiction in a counterclaim. Federal question jurisdiction cannot be predicated on federal issues that may arise later in an action by way of defense or counterclaim. Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L. Rev. 1781, 1783 (1998) (citing *Takeda v. Northwestern Nat. Life Ins. Co.*, 765 F.2d 815, 821-22 (9th Cir. 1998)).

My conclusion that there is no properly invoked federal question in the underlying case relies on basic principles of "arising under" jurisdiction. Federal courts are courts of limited jurisdiction. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts . . . possess only that power authorized by the Constitution and statute, which is not to be expanded by judicial decree."). Article III of the Constitution gives federal courts the power to hear cases "arising under" the Constitution, laws, and treaties of the United States. U.S. Const.

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district court, parties, and apparently now the majority have treated this as an inquiry into who "the real party in interest" is in Ms. Vaden's counterclaims. The majority states, "[m]ore specifically, we asked the district court to determine whether Discover Bank or DFS was the real party in interest with respect to Vaden's state court counterclaims." *Op.* at 3.

art. III, § 2, cl. 1. This grant of power is not self-executing. Congress did not give the federal courts general federal question jurisdiction until the Judiciary Act of 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (1994)). Although the language of § 1331 tracks Article III's arising under language, the Supreme Court has given § 1331 a limiting construction. Miller, 76 Tex. L. Rev. at 1782. "One of the keystones of this limiting construction is the 'well-pleaded complaint rule' articulated by the Supreme Court in *Louisville & Nashville R.R. v. Mottley* and constantly reaffirmed by the federal judiciary." *Id.* For the Court to have jurisdiction under § 1331, it must be clear from the face of a well-pleaded complaint that there is a federal question; the federal issue must exist as part of the plaintiff's cause of action. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152-54 (1908). A federal right must be an essential element of the plaintiff's claim; "the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-13 (1936). This rule also serves the essential administrative function of establishing the existence of a federal question at the onset of litigation. Miller, 76 Tex. L. Rev. at 1783. The well-pleaded complaint rule applies equally to original and removal jurisdiction and has prevented federal courts from asserting jurisdiction over many cases in which federal issues have actually been raised. *Id.* "This bright-line rule prevents the disruption, to both the system and the litigants, of shifting a case between state and federal [sic] for a in the middle of an action as federal issues arise or fall out." *Id.*

State courts, on the other hand, are courts of general jurisdiction. The Supreme Court has held that not only do state courts have the ability to hear federal claims, but that in all but the most exceptional circumstances they *must* hear federal claims. *See generally Testa v. Katt*, 330 U.S. 386 (1947) (establishing that state courts have a general obligation to hear federal claims). This ability and obligation of state courts to hear federal claims and enforce federal law is derived from the Supremacy Clause of the U.S. Constitution.[3]

In the case before this court seeking to compel arbitration, federal jurisdiction is purportedly based upon defendant's state court *counterclaim* alleging illegal late fees and interest rates. There was no diversity jurisdiction and no federal question appeared on the face of the complaint. In affirming the district court, the majority undertook an examination of the state counterclaims using novel understandings of procedural rules as to parties[4] and

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[3]The Supremacy Clause provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[4]The "party of interest" inquiry suggested in *Vaden I* was but another unnecessary detour which resulted in the parties, the district court, and the majority becoming procedurally lost. *Federal Rule of Civil Procedure* 17(a) states in pertinent part "[e]very action shall be prosecuted in the name of the real party in interest." I am puzzled by the majority's "real party in interest" analysis, which appears to be backward. A defendant can never be a real party in interest.

a completely puzzling view of the doctrine of complete preemption. This process led the majority of this panel to agree with the district court that Ms. Vaden's *counterclaims* provided federal subject matter jurisdiction over the underlying case, and therefore an independent jurisdictional basis existed to permit the court to decide the petition to compel arbitration under the FAA. This was error. There was no "properly invoked federal question" in the underlying state case.

The Court in *Holmes Group, Inc. v. Vornado Air Circulation Systems*, 535 U.S. 826, 830 (2002), addressed the question of whether a counterclaim can serve as the basis for arising under jurisdiction. The Court held that it could not. The Court noted that the well-pleaded complaint rule has long governed whether a case "arises under" federal law for purposes of § 1331. *Holmes Group, Inc.*, 535 U.S. at 830 (citing *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127-128, (1974) (per curiam)). The Court stated, "a counterclaim — which appears as part of the defendant's answer, not as part of the plaintiff's

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By its very nature, Rule 17(a) applies only to those who are *asserting* a claim. 6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice & Procedure* § 1543 (2d ed. 1987) (emphasis added). The real party in interest requirement is not limited to original plaintiffs but must also be satisfied for purposes of *asserting* a counterclaim. *Id.* (emphasis added). Here the counterclaimant was Ms. Vaden. No part of Rule 17(a) suggests an inquiry into whether an entity might be a proper defendant. Quite generally people can and do sue whomever they intend. If Discover Financial Services believed it was not the proper party to be sued it could have filed a motion for summary judgment.

complaint — cannot serve as the basis for 'arising under' jurisdiction." *Holmes Group, Inc.*, 535 U.S. at 831 (citing In re *Adams*, 809 F.2d 1187, 1188 n.1 (5th Cir. 1987); *FDIC v. Elefant*, 790 F.2d 661, 667 (7th Cir. 1986); *Takeda v. Northwestern National Life Ins. Co.*, 765 F.2d 815, 822 (9th Cir. 1985); 14B C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3722, pp. 402-414 (3d ed. 1998)). The Court concluded, "[f]or these reasons, we decline to transform the longstanding well-pleaded-complaint rule into the 'well-pleaded-complaint-*or counterclaim* rule' urged by respondent." *Holmes Group*, 535 U.S. at 832 (emphasis in original).

The majority attempts to evade the clear holding in *Holmes Group* by misapplying the doctrine of complete preemption to counterclaims. The majority fails to recognize that complete preemption is solely a removal doctrine that is analytically applied to recharacterize allegations made in a plaintiff's *complaint*. The majority sets about its explication of its novel jurisdictional construct in footnotes two and three. *Op.* at 5, 6. An examination of these footnotes exposes the erroneous legal formulation upon which the majority opinion depends.

In footnote three, the majority acknowledges that complete preemption is a removal doctrine, stating, "[a]lthough complete preemption did originate in the removal context, we conclude that it also applies to the unique procedural posture of this case." *Op.* at 6 n.3. The majority offers as support for this proposition the following quote from *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987):

> On occasion, the Court has concluded that a preemptive force of a statute is so extraordinary that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

Contrary to the majority's apparent understanding, that passage makes plain that the doctrine of complete preemption has but one purpose — that is, the recharacterization of a *plaintiff's* state *complaint* so that it may be considered federal for the purposes of the well-pleaded complaint rule. The well-pleaded complaint rule states that, "a defendant may not remove a case to federal court unless the *plaintiff's complaint* establishes that the case 'arises under' federal law." *Franchise Tax Bd.*, 463 U.S. at 10 (footnote omitted; emphasis added). The complete preemption doctrine thus works to treat a plaintiff's state *complaint* as federal from its inception, thus permitting removal. "In the case of complete preemption . . . Congress 'so completely preempt[s] a particular area that any *civil complaint* raising this select group of claims is necessarily federal in character.'" *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 187 (4th Cir. 2002) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)) (emphasis added).

The majority's holding results in the adoption of a "*well-pleaded counterclaim rule*," rejected by the Court in *Holmes Group* as it would leave the acceptance or rejection of the state forum to the counterclaimant. "It would allow a defendant to remove a case brought in state court under state law,

thereby defeating plaintiff's choice of forum, simply by raising a federal counterclaim." *Holmes Group*, 535 U.S. at 831. Or in the case of a dispute requiring arbitration, it would deprive the state court of its concurrent jurisdiction to enforce the FAA. *See Moses H. Cone*, 460 U.S. at 25, 25 n.32 (noting that "enforcement of the [FAA] is left in large part to the state courts").

Footnote three in the majority opinion concludes: "To hold otherwise would have the perverse result of returning to state court otherwise completely preempted federal claims because of the unanticipated nature of a defendant's counterclaims." *Op.* at 6 n.3. Not to quibble, but the counterclaims never left state court, as the case was not removed or removable. No accepted theory of federal jurisdiction would put this claim properly before a federal court. In any event, what the majority characterizes as a perverse result is an accurate description of our legal system and the overlapping jurisdiction of state and federal courts. Federal counterclaims are adjudicated in state court every day. (*See, e.g.*, *City & County of Honolulu v. Sherman*, 129 P.3d 542 (Haw. 2006) (adjudicating counterclaims based on the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)); *Villas West II of Willowridge v. McGlothin*, 841 N.E. 2d 854 (Ind. App. 2006) (adjudicating at trial Fair Housing Act counterclaim); *Salon Enterprises, Inc. v. Langford*, 31 P.3d 290 (Kan. App. 2000) (adjudicating FLSA counterclaims); *Wash. Suburban Sanitary Comm'n v. CAE-Lin Corp.*, 622 A.2d 745 (Md. 1993) (granting summary judgment as to § 1983 counterclaims)).

I completely disagree with the majority's conclusion in footnote three. I believe *Holmes Group* is controlling here. In an attempt to support its contention that *Holmes Group* does not contradict its conclusion, the majority misinterprets the text of Wright & Miller. The majority in footnote three, selectively quotes Wright & Miller. A key portions [sic] is omitted. The omission substantially distorts the textual discussion. In context this section of the treatise states (omitted portion in bold):

> In contrast, under the complete-preemption doctrine, which has been invoked in a significant—and ever-increasing—number of cases and contexts, a narrow class of claims are so "necessarily federal" that they always will permit removal to federal court. In these cases, federal law "not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting congress's intent to permit removal." **Thus, if a plaintiff files suit in state court based upon a state cause of action, and the defendant removes the case on the basis of complete preemption, the federal district court will recharacterize the plaintiff's state cause of action as a federal claim for relief, making the removal proper on the basis of federal question jurisdiction. In this sense**, the complete-preemption doctrine overrides such fundamental cornerstones of federal

> subject matter jurisdiction as the well-pleaded complaint rule and the principle that the plaintiff is master of the complaint.

14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3722.1 at 508, 511 (3d ed. 1998) (emphasis added). Without omissions, the referenced passage makes clear that the doctrine of complete preemption is exclusively focused on claims in a *plaintiff's complaint* and offers no support for the majority's jurisdictional theory.

Finally, I am constrained to say that I am troubled by the court's use of the FAA as a make weight for jurisdiction. The FAA was designed to make arbitration agreements as enforceable as other contracts, *but not more so*. *Prima Paint*, 388 U.S. 395, 404 n.12 (1967). It did not intend "to elevate [them] over other forms of contract." *Id.* The Supreme Court has made clear that the plain language of § 4 forbids federal courts from adjudicating the merits of the dispute to be arbitrated. Yet, this court interprets § 4 to require the district courts to address the underlying dispute carefully enough to determine whether it states a federal question. The federal court does this, not so that it can resolve any of the parties' rights or remedies under federal law, but simply so it can take subject matter jurisdiction of a § 4 FAA action that is often nothing more than an ordinary contract action. *Cmty. State Bank v. Strong*, ___ F.3d ___, 2007 WL 1225343, *13 (11th Cir. 2007) (J. Marcus concurring).

With respect, I believe the approach taken by the majority here, and the panel in *Vaden I*, is mistaken. *Vaden I* puts this court at odds with at least four of our sister circuits. *See Westmoreland Corp. v. Findlay*, 100 F.3d 263, 267-69 (2d. Cir. 1996); *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 986-88 (5th Cir. 1992); *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 94 (6th Cir. 1997); *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 659 (7th Cir. 2006). The clear weight of authority is that § 4 does not make federal question jurisdiction over a petition to compel arbitration dependent on the nature of the underlying dispute to be arbitrated. *Community State Bank*, 2007 WL 1225343 at *12. Actions are regularly filed under the FAA, and the approach adopted by this court, finding federal question jurisdiction where the court is asked only to enforce a private contract, considerably, and in my view unjustifiably, expands federal court jurisdiction. *Community State Bank*, 2007 WL 1225343 at *12. I do not believe we should look beyond the face of the arbitration petition to determine jurisdiction.

The district court erred in determining it had subject matter jurisdiction. There is no properly invoked federal question in the underlying case. Therefore there is no independent basis for jurisdiction over the suit seeking enforcement under the FAA. I would remand to the district court with instructions to dismiss the case for lack of subject matter jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

*

DISCOVER BANK, et al.,

*

Plaintiffs,

v. * CIVIL NO.: WDQ-03-3224

BETTY E. VADEN, *

Defendant. *

* * * * * * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

Discover Bank and Discover Financial Services, Inc. ("DFS") (collectively, "Discover") moved to compel arbitration of Vaden's counterclaims under the Federal Arbitration Act ("FAA")[1]. By Memorandum Opinion and Order dated June 21, 2004 ("June 2004 Opinion"), this Court granted Discover's motion and stayed prosecution of Vaden's counterclaims pending arbitration. Vaden appealed to the United States Court of Appeals for the Fourth Circuit. *See Discover Bank v. Vaden*, 396 F.3d 366 (4th Cir. 2005). In her appeal, Vaden challenged the Court's subject matter jurisdiction. The case was vacated and remanded for the determination of

[1] 9 U.S.C. § 1 *et seq.* (2005).

whether subject matter jurisdiction exists. *Id.* at 373. If the Court found that jurisdiction existed, the Fourth Circuit ordered the Court to reexamine whether Vaden's counterclaims were subject to arbitration. *Id.* at 373 n.4.

Pending is Vaden's motion to dismiss for lack of subject matter jurisdiction. For the reasons discussed below, Vaden's motion to dismiss will be denied and Vaden's counterclaims will be stayed pending arbitration.

BACKGROUND

On June 23, 2003, DFS sued Vaden in the Circuit Court for Baltimore City, Maryland for nonpayment of over $10,000 that was past due on Vaden's credit card. *See* Mem. in Support of Pls.' Mot. to Compel at p. 2. DFS is the servicing affiliate of Discover Bank, a Delaware federally insured bank. *See* Verified Complaint at ¶2. Vaden then filed class action counterclaims against DFS. *See* Mem. in Support of Pls.' Mot. to Compel at p. 2. The counterclaims allege illegal assessment of finance charges, late fees, and interest rates and breach of contract in violation of Maryland law. *See* Counterclaim at ¶¶ 41, 47, 52, 58, 67, 75, 81, 93.

On November 12, 2003, Discover filed a petition with this Court to compel arbitration of Vaden's counterclaims.[2] *See* Verified Complaint.

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[2] Vaden also filed a motion to dismiss and a motion for summary judgment on December 15, 2003 and January 12, 2004, respectively. In its June 2004 Opinion, the Court denied both motions.

Discover alleged that a mandatory arbitration provision was added to Vaden's Cardmember Agreement in 1999. *See id.* at ¶20. The Court granted Discover's motion. *See* June 2004 Opinion at p. 13.

The Fourth Circuit held that the Court's authority to grant Discover's motion depends upon whether the Court has subject matter jurisdiction over the parties' underlying dispute. *See Discover Bank*, 396 F.3d at 368. Vaden maintains that the Court lacks jurisdiction because her counterclaims are based solely upon Maryland law and no federal question is implicated. Discover counters that a federal question exists because Vaden's counterclaims are completely preempted by the Federal Deposit Insurance Act[3] ("FDIA").

On January 28, 2005, the Court ordered the parties to submit supplemental briefs addressing the Court's subject matter jurisdiction over the parties' underlying dispute. On April 4, 2005, Vaden moved to dismiss for lack of subject jurisdiction.

ANALYSIS

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

When subject matter jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)(1), the plaintiff has the burden of proving that subject matter jurisdiction exists. *Evans v. B.F. Perkins Co.*,

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[3] 12 U.S.C. §1831d(a) (2005).

166 F.3d 642, 647 (4th Cir. 1999) (*citing Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). In determining whether jurisdiction exists, "the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac*, 945 F.2d at 768 (*citing Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987)). The district court should apply the standard used for motions for summary judgment, whereby the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Id.* (*citing Trentacosta*, 813 F.2d at 1559). "The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (*citing Trentacosta*, 813 F.2d at 1558).

1. Federal Question Jurisdiction and Complete Preemption

Although a district court may compel arbitration pursuant to Section 4 of the FAA, the FAA, alone, does not confer subject matter jurisdiction. *See Discover Bank*, 396 F.3d at 368. The court's jurisdiction, therefore, must lie within the underlying dispute allegedly subject to arbitration. *See id.* at 369. Discover contends that the Court has subject matter jurisdiction based upon Section 27(a) of the FDIA. Specifically, Discover argues that the

FDIA completely preempts Vaden's state counterclaims.

Under the doctrine of complete preemption, a complaint that alleges only state law causes of action may be removed when the state claims necessarily invoke a federal law. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). The complete preemption doctrine rests on the notion that "on occasion . . . the preemptive force of a statute is so extraordinary that it converts an ordinary state common law complaint into one stating a federal claim . . ." [sic] *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir. 2000).

Vaden's counterclaims are based upon fees and interest rates charged on her Discover account and breach of contract. In regard to her illegal fees and interest rate claims, Vaden alleges violations of sections 12-502, 12-506 and 12-506.2 of the Commercial Law Article of the Maryland Annotated Code. *See* Counterclaim at ¶¶ 41, 47, 52. These sections regulate the assessment of finance charges and late fees and the compounding of interest upon a consumer credit card account. *See* MD CODE ANN., COM. LAW §§12-502, 12-506, 12-506.2 (2005). These provisions, however, are in stark contrast with the laws of Delaware, the state in which Discover was organized. *See* DEL. CODE ANN. tit. 5, §§ 941(8), 943, 945, 950, 952 (2005) (permits bank to charge late fees, interest and compound interest in accordance with the cardholder agreement).

Section 27(a) of the FDIA provides in pertinent part:

> In order to prevent discrimination against state-chartered insured depository institutions . . . with respect to interest rates . . . such state bank[s] . . . may, notwithstanding any state constitution or statute which is hereby preempted for purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other, evidence of debt, interest . . . . [sic] at the rate allowed by the laws of the state . . . where the bank is located.

12 U.S.C. §1831d(a).

The United States Supreme Court has determined that sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85, 86 (2005), completely preempt state law usury claims against national banks. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003). Section 27(a) is the counterpart to sections 85 and 86. *Cross-Country Bank v. Klussman*, No. C-01-4190, 2004 U.S. Dist. LEXIS 7835, at *15 (N.D. Cal. Apr. 30, 2004). Courts, therefore, have held that Section 27(a) should be construed in *pari materia* with sections 85 and 86. *Hill v. Chemical Bank*, 799 F. Supp. 948, 951-52 (D. Minn. 1992) ("Generally, similar language should be interpreted in the same way, unless context requires a different interpretation."). It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the

same way. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992) (citing *Morales v. TWA*, 504 U.S. 374, 384 (1992)).

Vaden concedes that the FDIA completely preempts any state claims against a federally insured bank such as Discover Bank. Vaden, however, argues that because she filed counterclaims against DFS, a non-bank, the FDIA is not implicated. Looking solely at the face of Vaden's counterclaims, it appears that she is correct--Vaden's counterclaims address DFS only. However, as the Fourth Circuit noted, a determination as to whether Discover Bank, as opposed to merely DFS is a party of interest in the state law suit is dispositive. *See Discover Bank*, 396 F.3d at 373, n.3.

Vaden's counterclaims allege damages based upon improper assessment of fees and interest charges. Although Vaden's claims are against DFS only, the record clearly demonstrates that Discover Bank is the real party in interest. Vaden and Discover Bank are the sole parties to the Cardmember Agreement. *See* Ex. 1 to Pls. Opp. Mot. Dism.[4] ("Roberts Decl. [sic]) at ¶¶4, 5. Discover Bank, not DFS, issues credit, establishes the terms of credit, including the interest rate and fees. *See id.* at ¶¶13, 14; *See* [sic] *also* Ex. 2 to Pls. Opp. Mot. Dism. ("Panzarino Decl." at ¶¶3-5. DFS is merely a servicing affiliate of Discover Bank. *See* Ex. 1 to Pls. Opp. Mot. Dism. ("Roberts Decl. [sic]) at ¶14. As the servicing affiliate, DFS performs certain services for

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[4] All references to exhibits attached to Pls. Opp. refer to the Opposition filed in response to Vaden's 1/12/2004 motion to dismiss.

Discover Bank, including, but not limited to, marketing, customer service and collection services. *See* Ex. C to Roberts Decl. ("First Revised Service Agreement").

Despite this evidence, Vaden maintains that whether Discover Bank is the real party in interest is irrelevant. *See* Mot. Dism. at p. 7. She suggests that as the counter-plaintiff, she may sue a party even if her claim ultimately fails. *See id.* This argument, however, is unpersuasive. The Court must look beyond Vaden's attempts to characterize her claims to avoid federal jurisdiction. *Phipps v. FDIC*, 417 F.3d 1006, 1011 (8th Cir. 2005) (*quoting M. Nahas & Co. Inc. v. First Nat'l Bank*, 930 F.2d 608, 611-12 (8th Cir. 1991)). Complete preemption applies when a party seeks recovery for excessive fees and interest of loans that were made by a national bank, even if the bank is not named as a party. *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000).

In urging the Court not to apply the complete preemption doctrine, Vaden cites cases finding complete preemption inapplicable to claims asserted against non-banks. These cases, however, are wholly inapposite. In all these cases, the Court either found that the bank was not the true lender or the allegations were not directed at the specific terms of the loan. *See Flowers v. EZPawn Okla., Inc.*, 307 F. Supp. 2d 1191, 1205-06 (N.D. Okla. 2004) (factual dispute regarding whether national bank was true lender); *Carson v. H & R Block, Inc.*, 250 F. Supp. 2d 669, 674 (S.D. Miss. 2003) (complete preemption doctrine inapplicable because plaintiff's allegations did not relate to any usurious interest rate charge,

excessive fee or other alleged national bank violation); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 717 (E.D.N.C. 2002) ("a sharp factual issue is presented as to whether Goleta is the real lender at issue"); *Green v H & R Block*, 981 F. Supp. 951, 955 (D.Md. 1997) ("gravamen of all plaintiff's claims is the alleged fiduciary duty owed by defendants to plaintiff, not usury claims").

Here, it is clear that Discover Bank, not DFS, is the true lender and that Vaden's counterclaims are directed against the alleged unlawful terms of the loan, not DFS' servicing of the loan. The complete preemption doctrine, therefore, applies.

Accordingly, the Court has subject matter jurisdiction over Discover's motion to compel.[5]

B. Motion to Compel Arbitration

The Fourth Circuit also directed the Court to reexamine whether there was a "question of material fact about the existence of an arbitration agreement". *Discover Bank*, 396 F.3d at 373, n.4. Specifically, the Court must consider whether Discover's financial records, viewed in the light most favorable to Vaden, could successfully rebut the presumption that she was subject to the amended agreement during the relevant time period. *See id.*

The Cardmember Agreement that Vaden received when she obtained credit with the Plaintiffs in 1990 provided that Discover could:

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[5] The Court will also exercise supplemental jurisdiction over Counts IV-VIII. *See* 28 U.S.C. §1367(a) (2005).

> change any term or part of this Agreement, including any Finance charge rate, fee or method of computing any balance upon which the Finance Charge rate is assessed, by sending you a written notice at least 30 days before the change is to become effective. Your express written agreement to any such change or the use of your Account or the Card on or after the effective date of the change means that you accept and agree to the change. We may apply any such change to the outstanding balance of your Account on the effective date of the change of terms and to new charges made after that date.

See Ex. 1 to Verified Complaint. ("Cardmember Agreement"). The agreement is "governed by the laws of the State of Delaware and applicable federal laws." *Id.*

In 1999, an arbitration clause was added to the Cardmember Agreement. *See* Verified Complaint at ¶¶ 18-26. The arbitration clause stated that:

> In the event of any past, present or future claim or dispute . . . between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the

Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.

IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. . . . Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit, and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision.

If you do not agree to the changes, you must notify us in writing by September 15, 1999. . . . If you notify us, we will close your Account and you will pay us the balance that you owe us under the current terms of the Agreement. If you do not notify us, the changes set forth in this notice will be effective and will apply to your Account for billing[] periods beginning after September 1, 1999. Use of your Account on or after October 1, 1999, means that you accept the new terms, even if you previously notified us that you did not agree to the changes.

See Ex. C to Verified Complaint ("The 1999 Amendment").

In July 1999, the 1999 Amendment was sent to all eligible Platinum cardmembers. *See* Ex. 1 to Pls. Supp. Brf. ("Loeger Supp. Decl."). Thereafter, a virtually identical amendment was also sent to all "new, converted and reissued cardmembers" whose accounts were processed between July 1, 1999 and September 30, 1999 ("Fulfillment Kit Notice of Amendment"). *See id.* at ¶¶ 8-9. For those members whose accounts were converted to Platinum status, they received a Fulfillment Kit which included their Discover Platinum card, the Discover Platinum Cardmember Agreement, a form cover letter notifying them of the conversion and a notice of amendment to the Discover Platinum Cardmember Agreement adding the arbitration provision. *See id.* at ¶9.

According to Discover's records, in June 1999, Vaden received a Discover Platinum Card and notification of upgrade. *See id.* at ¶3. Discover maintains that in July 1999, Vaden received the 1999 Amendment along with her regular monthly billing statements. *See id.* at ¶4. Discover contends that Vaden did not opt-out of the 1999 Amendment. *See* Verified Complaint at ¶28. Instead, Vaden used her card until 2001, when her privileges were suspended for nonpayment. *See* Ex. D to Verified Complaint (Vaden's Monthly Discover Card Statements for July 1999 - April 2001).

Vaden, however, argues that she is not subject to the 1999 Amendment, because she was not a Platinum Cardmember in July 1999. *See* Def. Supp.

Brf. at pp. 21-25. She claims that she would have not received the 1999 Amendment as a non-Platinum Cardmember. *See id.* Furthermore, she maintains that even if she received the 1999 Amendment, she was not bound by its terms. *See id.* Even assuming that Vaden's assertions are correct, Vaden's claims are subject to arbitration.

Vaden bases her argument that she is not subject to the arbitration agreement upon alleged inaccuracies in Discover's financial records. *See id.* Vaden maintains that her card was not upgraded to Platinum status until September 1999. *See id.* at pp. 22,23. In support, she notes that her monthly statements did not contain the "Platinum" brand until her October 1999 statement. *See id.* She also notes that Discover's records are inaccurate because they also incorrectly note that her credit limit was increased in June 1999, rather than in May 1999. *See id.* at p. 26. She, therefore, argues that any reliance upon Discover's financial records which indicate that she was a Platinum holder prior to September 1999 is misplaced.

Vaden, however, ignores the uncontroverted evidence that Discover also amended its Cardmember Agreement, incorporating the arbitration provision, by providing Fulfillment Kits to eligible cardmembers after July 1999. If Vaden became a Platinum Cardmember in September 1999, she would have received a Fulfillment Kit containing the arbitration agreement. Discover adduces evidence that appropriate measures were taken to ensure that all eligible cardmembers received their Fulfillment Kits. *See* Ex. A to Pls. Supp. Brf. ("Loeger Suppl. Decl.") at

¶¶11-12. For example, Discover ensured that the Fulfillment Kits and all of the required materials were sent to all eligible cardmembers' billing addresses. *See id.* As the Court stated in its June 2004 Opinion, "evidence that a notice of amendment was properly mailed gives rise to a rebuttable presumption of receipt." *See* 2004 Opinion at p. 9 (*citing Kurz v. Chase-Manhattan Bank USA, N.A.*, No. 03-5678, 2004 U.S. Dist. LEXIS 9711, at *14 (S.D.N.Y. 2004) [sic]. Vaden does not contend that she never received her Discover Platinum card, rather she argues that she never received the arbitration agreement. If the Platinum card was properly delivered in September 1999, then it is highly likely that Vaden would have also received the arbitration agreement.

Although Vaden submits that she did not receive an arbitration agreement, she adduces no evidence -- other than her denial -- to rebut this presumption. *See Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734-35 (7th Cir. 2002) (enforcing an arbitration agreement against an employee who claimed that she did not receive it). As the Court is satisfied that an arbitration agreement existed between the parties and Vaden failed to exercise her right to opt-out, her claims are subject to arbitration. Accordingly, the Court will order arbitration of Vaden's counterclaims. *See Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 634 (4th Cir. 2002) (court must order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored).

CONCLUSION

For the reasons discussed above, the Defendant's motion to dismiss will be denied and the Plaintiffs' motion to compel arbitration will be granted.

January 18, 2006
Date

/s/
William D. Quarles, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

*

DISCOVER BANK, et al.,

*

Plaintiffs,

v. * CIVIL NO.: WDQ-03-3224

BETTY E. VADEN, *

Defendant. *

* * * * * * * * * * * * * * * * * * *

ORDER

For the reasons discussed in the accompanying Memorandum Opinion, it is, this 18th day of January 2006, ORDERED that:

1. The Defendant's motion to dismiss BE, and HEREBY IS, DENIED;

2. The Plaintiffs' motion to compel arbitration BE, and HEREBY IS, GRANTED;

3. The Defendant's prosecution of her counterclaims in state court BE, and HEREBY IS, STAYED pending the outcome of arbitration;

4. This case be CLOSED; and

5. The Clerk of the Court shall send copies of this memorandum opinion and Order to counsel for the parties.

/s/
William D. Quarles, Jr.
United States District Judge

APPENDIX D

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INCORPORATED,
Plaintiffs-Appellees,

v. No. 04-1848

BETTY E. VADEN,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William D. Quarles, Jr., District Judge.
(CA-03-3224-1-WDQ)

Argued: December 1, 2004

Decided: January 24, 2005

Before WILKINSON, TRAXLER, and DUNCAN,
Circuit Judges.

Vacated and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Traxler and Judge Duncan joined.

COUNSEL

ARGUED: John Andrew Mattingly, Jr., BALDWIN, BRISCOE & MATTINGLY, CHTD., Lexington Park, Maryland, for Appellant. Christopher Landau, KIRKLAND & ELLIS, L.L.P., Washington, D.C. for Appellees. **ON BRIEF:** Joseph W. Hovermill, Matthew T. Wagman, John C. Celeste, II, MILES & STOCKBRIDGE, P.C., Baltimore, Maryland; Alan S. Kaplinsky, Martin C. Bryce, Jr., BALLARD, SPAHR, ANDREWS & INGERSOLL, L.L.P., Philadelphia, Pennsylvania, for Appellees.

OPINION

WILKINSON, Circuit Judge:

Betty Vaden, a Discover card holder, was sued in state court by Discover Financial Services, an affiliate of Discover Bank, for her unpaid credit card balance. In response, she instituted several class action counterclaims against Discover Financial Services based on state law. Discover then filed suit in federal district court under § 4 of the Federal Arbitration Act, seeking to compel Ms. Vaden to submit her counterclaims to arbitration. The district court ordered arbitration.

On appeal, this court was presented with a host of issues, including the threshold question of whether the federal district court had subject matter jurisdiction to hear the case. We remand most of these issues for the district court to consider in the

first instance. However, we do hold that when a party comes to federal court seeking to compel arbitration, the presence of a federal question in the underlying dispute is sufficient to support subject matter jurisdiction. Whether such a question exists here is a matter we reserve for the district court on remand.

I.

Discover Bank issued Betty Vaden a credit card in October 1990. Discover Financial Services ("DFS") is the servicing affiliate of the bank. On June 23, 2003, DFS sued Ms. Vaden in Maryland state court for the nonpayment of over $10,000 in credit card bills. Ms. Vaden responded by filing several class action counterclaims against DFS on behalf of herself and other Maryland residents. All of these counter-claims — most involving breach of contract allegations as to increased interest rates and late fees — were based on Maryland law. It is Discover's position that these state law claims are completely preempted by the Federal Deposit Insurance Act.

On November 12, 2003, Discover filed a petition in the United States District Court for the District of Maryland seeking to compel arbitration of Ms. Vaden's counterclaims. According to Discover, Ms. Vaden's credit card agreement was amended in July 1999 to include a provision requiring arbitration in the event of a dispute. Thus, Discover asked the federal court to compel arbitration, invoking § 4 of the Federal Arbitration Act. 9 U.S.C. § 4 (2000).

Whether or not a valid arbitration agreement exists between the parties is a matter of some

controversy. Ms. Vaden has never signed such an agreement. However, Discover points to language in the original credit agreement which specifies that it can be amended by written notice and that "the use of your Account or the Card on or after the effective date of the change means that you accept and agree to the change." Discover claims it mailed Ms. Vaden a notice in July 1999 explaining that her credit card agreement was being amended to include an arbitration provision. By continuing to use her card after receiving this notice, Discover says Ms. Vaden consented to the new terms of her agreement.

Ms. Vaden argues, however, that this notice of amendment was addressed only to Discover card members who held a Discover Platinum card. She claims — supported by evidence from Discover's own business records — that she was not a Discover Platinum card holder until September 1999. Thus, she says, the amendment notice allegedly sent in July did not apply to her.[1]

In any event, on December 15, 2003, and on January 12, 2004, Ms. Vaden filed a motion to dismiss and a motion for summary judgment with the district court. She asked the court to dismiss Discover's suit compelling arbitration for two main reasons. First, Ms. Vaden claimed that Discover Bank lacked standing to sue for arbitration since the class action counterclaims were filed against Discover

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[1] Discover counters this argument by explaining that Ms. Vaden's account was "automatically" upgraded to a Discover Platinum account in June of 1999. Ms. Vaden contends, though, that she was not asked to write her check to Discover Platinum until November of 1999.

Financial Services, and not Discover Bank. Second, Ms. Vaden argued that she had never validly entered into an arbitration agreement with Discover.

On June 21, 2004, the district court rejected Ms. Vaden's arguments and granted Discover's request to compel arbitration. It ordered that Ms. Vaden's counterclaims in state court be stayed pending the outcome of the arbitration. With the exception of the standing issue, the district court did not have the opportunity to address any of the issues relating to its subject matter jurisdiction which are now before this court on appeal.

II.

We must first address the question of whether the district court had subject matter jurisdiction over the present case. Discover asserts that its suit is properly in federal court by virtue of 28 U.S.C. § 1331 (2000) because it presents a federal question. Since neither party pressed this issue in the court below, it is before us for the first time on appeal.

Discover invokes § 4 of the Federal Arbitration Act ("FAA") to support its view that federal question jurisdiction exists. This part of the FAA states that a petition to compel arbitration can be filed in "any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties. . . ." 9 U.S.C. § 4.

No one contends that this statute in and of itself constitutes a federal question. Indeed, such an understanding is inconsistent with the language of the statute and has been foreclosed by the Supreme Court. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25, n.32, (1983). However, the courts of appeals are in disagreement as to whether — in a suit to compel arbitration authorized by § 4 — a district court has subject matter jurisdiction of a case when the underlying dispute between the parties raises a federal question. Compare *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2d Cir. 1996) *with Tamiami Partners, Ltd. v. Miccosukee Tribe*, 177 F.3d 1212 (11th Cir. 1999).

There are two approaches to this issue, which respectively narrow and broaden the instances in which a federal court can properly assume jurisdiction of a suit under § 4 of the FAA. The narrower view has come to be known as the *Westmoreland* doctrine. *See Blue Cross v. Anesthesia Care Assocs. Med. Group*, 187 F.3d 1045, 1050, n.5 (9th Cir. 1999). This doctrine holds that for a district court to have federal question jurisdiction over a suit compelling arbitration, the federal question must be evident on the face of the arbitration petition itself. Perhaps realizing that such a possibility is highly unlikely, the *Westmoreland* line of cases concludes that federal question jurisdiction will never form the basis for a court's subject matter jurisdiction to hear a § 4 petition. *Westmoreland*, 100 F.3d at 268. Under this view, jurisdiction will lie only when "some other basis for federal jurisdiction exists, such as diversity of citizenship or assertion of a claim in admiralty," but will not lie simply because the underlying

controversy between the parties "raises a federal question." *Id.*

By contrast, the broader view permits a federal court to examine the underlying dispute between the parties to determine if a federal question is present. On this understanding, a district court is permitted to "look through" the arbitration request to assess whether the overall controversy between the parties is grounded in federal law. *Tamiami Partners*, 177 F.3d at 1223, n.11.

After examining the text of § 4 and the relevant precedent, we are persuaded by the broader view outlined above. We thus hold that a federal court possesses subject matter jurisdiction over a case when the controversy underlying the arbitration agreement presents a federal question.

A.

It is fundamental that "[w]hen interpreting statutes we start with the plain language." *U.S. Dep't of Labor v. North Carolina Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004). In fact, "where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *U.S. ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245, 247 (4th Cir. 2004)(internal quotation omitted).

Section 4 of the FAA states:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate

> under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties . . .

9 U.S.C. § 4. We are convinced that this language directs courts to look through the arbitration agreement so to assess questions of subject matter jurisdiction. There are three specific components of the text which lead us to this conclusion.

First, there is the phrase "save for such agreement" in the text of § 4. It is a classic canon of statutory construction that courts must "give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous." *United States v. Ryan-Webster*, 353 F.3d 353, 366 (4th Cir. 2003)(internal quotation omitted). When interpreting these words, we must give them their "common and ordinary meaning." *Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999).

The common understanding of the phrase "save for" means "but for" or "notwithstanding." Used in this context, "save for such agreement" must mean that the district court would have jurisdiction of the case even if the agreement had never existed. We thus read this phrase as an instruction to set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently. Indeed, we can think of no other reason why

Congress would have chosen to include the "save for" language.[2]

Second, we find significant the decision of Congress to reference "Title 28" generally in the text of § 4. The statute reads that a party can petition a district court which "save for such agreement, would have jurisdiction under Title 28 . . ." 9 U.S.C. § 4. Congress could have decided to parse Title 28 into its component parts. It could, for instance, have specifically referred to either § 1332 (diversity) or § 1331 (federal question jurisdiction). There are indeed examples in the United States Code where Congress has been so specific. *See, e.g.*, 42 U.S.C. § 9613(h) (2000); 22 U.S.C. § 6082(c)(1) (2000). But Congress chose not to do so in the FAA. And "where Congress knows how to say something but chooses not to, its

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[2] We are unpersuaded by the argument adopted by some courts that the "save for" language was included by Congress for the purpose of responding to an "antiquated and arcane principal of the common law" where a claim for specific performance of an arbitration agreement would oust the court of jurisdiction. *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F.Supp. 957, 961-62 (S.D.N.Y. 1988).

As the authors of a respected federal arbitration treatise explain, this theory is historically inaccurate. See 1 MacNeil, Speidel & Stipanowich, *Federal Arbitration Law* § 9.2.3 (1995). For, the "save for" language is found only in the FAA, not in any of the state arbitration reform acts upon which the FAA was based. Those states suffered from the same common law ouster problem. Had the "save for" language been meant to solve the ouster problem, "similar language would have been found in the 1920 New York Act, the 1923 New Jersey Act, and the old UAA, all drafted by the same reformers who drafted the FAA." *Id.* at 9:18.

silence is controlling." *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000)(internal quotation omitted).

This general reference to "Title 28" means a party may petition a district court to compel arbitration if the district court would have subject matter jurisdiction of the underlying suit by virtue of any provision in Title 28. Siphoning off federal question jurisdiction from Title 28 would rewrite the statute.

The third section of the statutory text we find significant is the phrase "controversy between the parties." Section 4 specifies that one can seek to compel arbitration in a district court when that court would have jurisdiction "under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties. . . ." 9 U.S.C. § 4. Those urging adoption of the *Westmoreland* doctrine would interpret the phrase "controversy between the parties" to encompass only the discrete dispute about whether there is a valid arbitration agreement. We think the more natural reading of the phrase is as a reference to the overall substantive conflict between the parties.

Litigants do not come to court solely to resolve the collateral issue of whether or not they have an agreement to arbitrate. Instead, parties incurring the expense and burdens of litigation are motivated to resolve their real-life conflicts and move on. In this case, for example, the question of the arbitration agreement's existence only arose because one party thought it was owed $10,000. That alleged debt is the source of the "controversy between the parties." The "controversy between the parties," as that term is

used in 9 U.S.C. § 4, is the underlying one, and it is that controversy that must arise under federal law.

This common understanding of the word "controversy" must govern our interpretation unless Congress chooses to narrow the term. The text of § 4 requires us to consider jurisdiction as it arises out of the whole controversy between the parties. This necessarily entails looking beyond the arbitration petition alone.

B.

Two further aspects of the *Westmoreland* doctrine reinforce our conclusion that it is not consistent with the statute.

1.

The courts which have adopted the *Westmoreland* doctrine were moved by an understandable allegiance to the well-pleaded complaint rule. *See, e.g., Westmoreland*, 100 F.3d at 268-69; *Prudential-Bache Secs., Inc. v. Fitch*, 966 F.2d 981, 988 (5th Cir. 1992). These cases rightly point out that, "[t]he usual rules for determining federal question jurisdiction provide that a complaint will not avail a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Prudential-Bache*, 966 F.2d at 988, citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936).

According to these courts, a federal question will never properly arise under a § 4 arbitration petition

because such a petition never invokes a federal question on its face. Thus, they reason, if the FAA "is construed to provide for a federal forum whenever the underlying dispute involves a federal question, it must be seen as overturning the well-established rule that § 1331 federal question jurisdiction must be determined based on the face of a well-pleaded complaint." *Valenzuela Bock*, 696 F. Supp. at 963. This result, they conclude, is unacceptable because "[t]here is no indication that Congress in enacting the FAA . . . intended to change the rules for determining federal jurisdiction over a complaint." *Prudential-Bache*, 966 F.2d at 988. *See also Westmoreland*, 100 F.3d at 269.

We respect this argument, but we do not find it persuasive. For it is not true that a fair reading of § 4 "changes the rules" of the well-pleaded complaint doctrine. Indeed, the rules of the well-pleaded complaint doctrine, while strict, are not as rigid as the *Westmoreland* court suggests.

Under the Declaratory Judgment Act, for example, a party which traditionally would be a defendant can bring a preemptive suit in federal court, thus accelerating the claim against it. This creates a wrinkle in the traditional well-pleaded complaint rule. A would-be *plaintiff* — who might well have a federal cause of action — is transformed into a declaratory-judgment *defendant*, incapable of invoking a federal question on the face of a well-pleaded complaint. *See generally* 10B Charles Alan Wright, et al., Federal Practice and Procedure § 2767 (3d ed. 1998).

The Supreme Court has resolved this by simply directing federal courts to hypothesize what a well-pleaded complaint in a traditional case would look like. "*Skelly Oil* has come to stand for the proposition that if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 16 (1983)(internal quotation omitted). Alternatively, "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Id.* at 19. Just as the real controversy for purposes of *Skelly Oil* and *Franchise Tax Board* was the prospect of a federal question suit which prompted the declaratory judgment action, so the real controversy in cases like the present one is whether a federal action prompted the motion to compel arbitration.

None of this, of course, expands federal question jurisdiction. Often, as in *Franchise Tax Board*, the conclusion reached will be that no properly invoked federal question exists in the underlying controversy. But this is not the inevitable conclusion; if it were, the entire reasoning process would be an exercise in futility and a waste of time. The same is true of the instructions in § 4 of the FAA. As explained above, the text of the FAA quite explicitly directs the federal courts to put aside the arbitration agreement, and determine if the court "would have jurisdiction under Title 28" without it. 9 U.S.C. § 4. By looking to the dispute underlying an arbitration petition — as the

text of § 4 requires us to do — we are not "changing the rules" of federal question jurisdiction. We are just applying the rules in the context of the FAA's procedural posture, just as the Supreme Court did with the Declaratory Judgment Act in *Franchise Tax Board*.

2.

There is a second aspect of the *Westmoreland* doctrine that concerns us. Were we to follow that line of cases, we would greatly restrict the ability of federal courts to hear cases under § 4 of the FAA. Indeed, the *Westmoreland* court admits that its view forecloses the possibility that federal question jurisdiction could ever form the basis for subject matter jurisdiction of a § 4 petition. *Westmoreland*, 100 F.3d at 268. This means that, for all practical purposes, a federal court could never hear a suit to compel arbitration unless the parties happen to be diverse. *Id.* ("A petition under FAA § 4 to compel or stay arbitration must be brought in state court unless some other basis for federal jurisdiction exists, such as diversity of citizenship or a claim in admiralty.").

We find this consequence of the *Westmoreland* doctrine inconsistent with the "congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses Cone*, 460 U.S. at 24. As we have explained, "[t]he Federal Arbitration Act embodies a federal policy favoring arbitration. Thus, 'as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 350 (4th Cir. 2001)

(quoting *Moses Cone*, 460 U.S. at 24-25). *See also Whiteside v. Teltech Corp.*, 940 F.2d 99, 101 (4th Cir. 1991).

Were we to follow *Westmoreland* and eliminate the ability of a federal court to hear a § 4 petition in which federal question jurisdiction exists over the actual dispute, we would be mangling the congressional intent behind the FAA that "plac[es] arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Of course state courts are capable of applying federal law, including a petition to compel arbitration under the FAA. But the disfavor to arbitration lies in limiting § 1331 in these cases to such an extent that the real controversy between the parties cannot reach federal court even when the plaintiff's complaint emphatically presents a federal question.

To be clear, we do not imply that arbitration agreements should receive preferential treatment. No doors to federal court are open to those claims that are closed to others. We agree that in passing the FAA Congress did not intend to create federal jurisdiction, *see Moses Cone*, 460 U.S. at 25, n.32, but we are likewise persuaded that Congress did not mean to unduly restrict federal jurisdiction either. We thus decline to eliminate § 1331 as a possible basis for federal jurisdiction over a petition to compel arbitration under § 4 of the FAA.

C.

In addition to the statutory text, our own precedent requires us to reject the *Westmoreland* doctrine.

In *Gibraltar, Inc. v. Otoki Group, Inc.*, this court faced a trademark ownership dispute. 104 F.3d 616 (4th Cir. 1997). Gibraltar filed suit in federal court, under § 4 of the FAA, asking that Otoki be compelled to arbitrate. *Id.* at 619. We agreed with the district court that it lacked subject matter jurisdiction since no properly invoked federal question existed. *Id.* Gibraltar had not alleged a violation of the Lanham Act, and we refused to hold that a federal question existed merely because the subject of the contract dispute was a federally-created property interest. *Id.* Significantly, however, we reached this conclusion only *after* examining the underlying controversy between the parties. *Id.* at 619.

Adhering to the *Westmoreland* doctrine would mean stopping the *Gibraltar* analysis after a realization that the parties were neither diverse nor making a claim in admiralty. This we cannot do. *Gibraltar* indicates, therefore, that we assume the plain text of § 4 requires us to ask whether any basis for subject matter jurisdiction would exist for the case in the absence of the arbitration agreement.

III.

A federal court may therefore hear a § 4 petition to compel arbitration if, but for the arbitration agreement, subject matter jurisdiction over the case would otherwise exist by virtue of a properly invoked federal question in the underlying dispute. The

question remains, however, whether such a federal question exists in this case. We reserve the resolution of that question for the district court.

We recognize that challenges to a federal court's subject matter jurisdiction can be brought at any stage in litigation. *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). However, this case presents several legally complex and partially fact-bound inquiries which must be answered prior to resolving the subject matter jurisdiction question.[3] We therefore think it prudent to remand these issues to the lower court, so that it can decide them in the first instance.[4]

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[3] Several such inquiries suggest themselves. First, in order to decide if a federal question exists, the court must decide whether Ms. Vaden's state law counterclaims are completely preempted by the Federal Deposit Insurance Act. *See* 12 U.S.C. § 1831d(a) (2000). This decision may be affected by the court's determination as to whether Discover Bank — as opposed to merely Discover Financial Services — is a party of interest in the state law suit.

Second, if the court finds that a federal question has not been properly stated, it will need to consider the pending motion to amend and, if granting it, ascertain whether the parties are diverse and whether the other requirements of § 1332 are properly met.

[4] In the event the lower court concludes it does have subject matter jurisdiction over this case, it should reexamine whether there was a question of material fact about the existence of an arbitration agreement between these particular parties. Specifically, the district court should consider whether Discover's own financial records — viewed in the light most favorable to Vaden — could successfully

VACATED AND REMANDED

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rebut the presumption that she was subject to the amended agreement during the relevant time period.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

*

DISCOVER BANK, et al.,

*

Plaintiffs,

v. * CIVIL NO.: WDQ-03-3224

BETTY E. VADEN, *

Defendant. *

* * * * * * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

Discover Bank and Discover Financial Services, Inc. ("DFS") (collectively, "Discover") have moved to compel arbitration under the Federal Arbitration Act ("FAA")[1] and to enjoin Betty E. Vaden from prosecution of a counterclaim that she filed in state court. In response, Vaden has filed a motion to dismiss against Discover Bank for lack of jurisdiction, a motion for summary judgment, and a motion to strike several of the exhibits submitted by Discover in response to her motion for summary judgment. For the reasons discussed below, Discover's motion to compel arbitration will be granted, and Vaden's

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[1] 9 U.S.C. § 1 *et seq.* (2004)

motions to dismiss, for summary judgment, and to strike exhibits will be denied.

BACKGROUND

On June 23, 2003, DFS sued Vaden in the Circuit Court for Baltimore City, Maryland for nonpayment of over $10,000 that was past due on Vaden's credit card. Mem. in Support of Pls.' Mot. to Compel 2. Vaden then filed class action counterclaims against DFS. *Id.*

The Cardmember Agreement that Vaden received when she obtained credit with the Plaintiffs in 1990 provided that Discover could:

> change any term or part of this Agreement, including any Finance charge rate, fee or method of computing any balance upon which the Finance Charge rate is assessed, by sending you a written notice at least 30 days before the change is to become effective. Your express written agreement to any such change or the use of your Account or the Card on or after the effective date of the change means that you accept and agree to the change. We may apply any such change to the outstanding balance of your Account on the effective date of the change of terms and to new charges made after that date.

Def.'s Ex. 1 to Mot. to Strike (Cardmember Agreement). The agreement is "governed by the laws of the State of Delaware and applicable federal laws." *Id.*

In 1999, an arbitration clause was added to the Cardmember Agreement. *Id.* ¶¶ 18-26. The arbitration clause stated that:

> In the event of any past, present or future claim or dispute. . . between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.
>
> IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. . . . Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit, and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision.
>
> If you do not agree to the changes, you must notify us in writing by September 15, 1999. . . . If you notify us, we will close your Account and you will pay us the balance that you owe us under the current terms of the Agreement. If you do not notify us, the changes set forth in this notice will be effective and will apply to

> your Account for billing[] periods beginning after September 1, 1999. Use of your Account on or after October 1, 1999, means that you accept the new terms, even if you previously notified us that you did not agree to the changes.

Pls.' Ex. C (Arbitration Amendment).

Vaden used her card continuously from 1990 to 2001, when her privileges were suspended for nonpayment. Mem. in Support of Pls.' Mot. to Compel 3.

ANALYSIS

A. Motion to Dismiss Against Plaintiff Discover Bank

When subject matter jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)1, the plaintiff has the burden of proving that subject matter jurisdiction exists. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (*citing Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). In determining whether jurisdiction exists, "the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac*, 945 F.2d at 768 (*citing Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987)). The district court should apply the

standard used for motions for summary judgment, whereby the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Id.* (*citing Trentacosta*, 813 F.2d at 1559). "The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (*citing Trentacosta*, 813 F.2d at 1558).

Vaden argues that because she filed counterclaims against DFS, rather than Discover Bank, Discover Bank lacks standing to sue to compel arbitration. Def.'s Mot. to Dismiss 3-10.

Parties to an arbitration agreement, however, have standing to sue to compel arbitration under the FAA. *See, e.g., Adkins v. Labor Ready*, 303 F.3d 496 (4th Cir. 2002); *Hightower v. GMRI, Inc.*, 272 F.3d 239 (4th Cir. 2001).

Discover Bank and Vaden are both parties to the Cardmember Agreement and Arbitration Amendment that governs Vaden's account. Pls.' Ex. A to Mot. to Compel(Cardmember Agreement); Pls.' Ex. 1 to Opp'n to Def.'s Mot. to Dismiss ¶¶ 4, 7 (Roberts Dec.); Pls.' Ex. 2 to Opp'n to Def.'s Mot. to Dismiss at ¶ 3 (Panzarino Dec.).

Vaden also asserts that Discover Bank lacks standing because it did not satisfy the statutory prerequisites to compel arbitration under the FAA. Def.'s Mot. to Dismiss 6-7. Specifically, Vaden asserts that Discover Bank is not an aggrieved party and

that it failed to provide her with the notice required by the statute. *Id.*

The FAA provides that:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default.

9 U.S.C. § 4 (2004).

The filing of a petition for an Order to compel arbitration satisfies the notice requirement of the FAA. *Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 526 (1st Cir. 1985); *All Saint's Brands, Inc. v. Brewery Group Denmark, A/S*, 57 F. Supp. 2d 825, 828 (D. Minn. 1999) (*citing Downing v. Merrill Lynch, Pierce, Fenner & Smith, I*[illegible], 725 F.2d 192, 196 (2d Cir. 1984) (Mansfield, J., concurring)). Because Discover Bank has filed a Complaint seeking an order to compel arbitration, it has provided Vaden with sufficient notice. Moreover, as Vaden has opposed its request for an Order to compel arbitration, Discover Bank is an aggrieved party. *See Hartford Accident & Indem. Co. v. Equitas Reinsurance Ltd.*, 200 F. Supp. 2d 102, 108 (D. Conn. 2002) (once an adverse party refuses to arbitrate, the plaintiff is aggrieved under the FAA).

Vaden claims that Discover Bank is judicially estopped from claiming that it was a party to her Cardmember Agreement because DFS, in responding to Vaden's requests for admissions in the case between Vaden and DFS in state court, explained that "*DFS* adhered to its policies and procedures when *DFS* extended credit to Vaden." Def.'s Ex. H to Mot. to Dismiss (Pls.' Resp. to Def.'s Request for Admissions) (emphasis added).

The doctrine of judicial estoppel provides that "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (*quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). Judicial estoppel applies when the party advancing an inconsistent position has succeeded in persuading a court to accept its earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first of the second court was misled. *Id.* at 750 (*citing Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)). "Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations.'" *Id.* at 751 (*quoting United States v. C.I.T. Constr. Inc.*, 944 F.2d 253, 259 (5th Cir. 1991)).

The case between DFS and Vaden in the state court has been stayed pending the Court's ruling on Discover's motion to compel arbitration. Pls.' Resp. to Def.'s Mot. to Dismiss 14. Because the state court

proceeding remains unresolved, Discover has not yet been successful in persuading that court of its allegedly inconsistent position. Accordingly, judicial estoppel is not applicable to Discover's stance in this case.

B. Motion for Summary Judgment

1. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to summary judgment as a matter of law. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), the Supreme Court explained that, in considering a motion for summary judgment, "the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Thus, "the judge must ask . . . whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id.* at 252.

In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom "in the light most favorable to the party opposing the motion," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), but the opponent must produce evidence upon which a reasonable fact finder could rely. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The mere existence of a "scintilla" of

evidence in support of the nonmoving party's case is not sufficient to preclude an order granting summary judgment. *Anderson*, 477 U.S. at 252.

2. Whether Vaden Received Notice of the Arbitration Amendment

Vaden argues that there is no agreement to arbitrate because she never received notice of the arbitration amendment. Def.'s Mot. for Summ. J. 4-9.

Whether the parties agreed to arbitrate is determined using state contract law. *Moody v. PNE Holdings, LLC*, 2002 WL 824637, *3 (W.D.N.C. 2002) (*citing Supak & Sons Mfg. Co., Inc. v. Pervel Indus. Inc.*, 593 F.2d 135 (4th Cir. 1979)).

It is undisputed that the Cardmember Agreement is governed by Delaware law. *See* Def.'s Ex. 1 to Mot. to Strike (Cardmember Agreement). Delaware Code Annotated title 5, § 952(a) provides:

> Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to plan benefits or features, the rate or rates of periodic interest, the manner of

> calculating periodic interest or outstanding unpaid indebtedness, variable schedules or formulas, interest charges, fees, collateral requirements, methods for obtaining or repaying extensions of credit, attorney's fees, plan termination, the manner for amending the terms of the agreement, arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever. Unless the agreement governing a revolving credit plan otherwise expressly provides, any amendment may, on and after the date upon which it becomes effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower's account under the plan, including any such indebtedness that arose prior to the effective date of the amendment. . . . Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower.

Cardholders must be permitted to opt out of amendments by sending notice to the bank. Del. Code Ann. tit. 5, § 952(b)(1)-(2) (2004). Use of the card after the time established to provide notice of rejection constitutes acceptance of the amendment, even if the cardholder has provided notice of rejection. § 952(b)(2).

Evidence that a notice of amendment was properly mailed gives rise to a rebuttable presumption of receipt. *Kurz v. Chase-Manhattan Bank USA, N.A.*,

2004 U.S. Dist. LEXIS 9711, *14 (S.D.N.Y. 2004) (*citing Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 918 (N.D. Tex. 2000)). Proof of mailing may be accomplished by presenting circumstantial evidence, including evidence of customary mailing practices used in the sender's business. *Id.* (*citing Marsh*, 103 F. Supp. 2d at 917-18 (crediting testimony of bank's vice president for operations about company's mass mailing process and quality assurance controls); *Fields v. Howe*, 2002 U.S. Dist. LEXIS 4515, *5-*6 S.D. Ind. 2002) (applying Delaware law and crediting vice president's testimony about mailing procedure); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1258 (Del. Super. Ct. 2001) (crediting testimony of bank vice president that amendment was sent to same address as bank statements and that it was not returned to sender as undeliverable)); *see also Pick v. Discover Fin. Servs., Inc.*, 2001 U.S. Dist. LEXIS 15777, *13 (D. Del. 2001) (applying Delaware law and crediting bank's proffer about its standard mailing procedures).

Discover has proffered the Declaration and Verified Complaint of Julie Loeger, Vice-President of DFS's marketing department. Loeger related that DFS mailed a notice informing cardholders of the arbitration amendment between July 1999 and August 1999. Verified Compl. ¶ 18. Notices were inserted into and mailed with the billing statements of all Discover cardholders who had open accounts and were receiving statements. *Id.* According to DFS's records, Vaden was mailed a copy of the notice of amendment on July 26, 1999. Loeger Dec. ¶ 11.

Discover's records do not reflect that Vaden submitted a notice rejecting the amendment, or that her notice of amendment was returned as undeliverable. Loeger Dec. ¶ 11. Vaden continued to use her card after the notice was distributed, and never alleged any unauthorized use of her credit card. *Id.* ¶ 15; Pls.' Ex. D (Vaden's monthly Discover Card Statements for July 1999 - April 2001).

Discover has adduced sufficient circumstantial evidence that it mailed the notice, and is entitled to presumption of receipt. *See Kurz*, 2004 U.S. Dist. LEXIS 9711, at *17.

The FAA establishes a strong federal policy favoring arbitration. *Coots v. Wachovia Sec., Inc.*, 2003 U.S. Dist. LEXIS 24331, *7 (D. Md. 2003) (*citing Moses E. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Accordingly, a federal district court must order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored. *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 634 (4th Cir. 2002).

Because Discover has shown that its arbitration amendment was made in accordance with applicable law and that Vaden received the amendment, the Court is satisfied that an arbitration agreement has been made. As Vaden has refused to submit her counterclaims to arbitration, Discover's motion to compel arbitration will be granted and Vaden's motion for summary judgment will be denied. However, when a district court finds that a controversy is arbitrable under the FAA, the appropriate course of action is stay the proceedings,

not to dismiss them. *See* 9 U.S.C. § 3 (2004); *West v. Merillat Indus., Inc.*, 92 F. Supp. 2d 558, 561 (W.D. Va. 2000). Accordingly, Discover's motion to enjoin Vaden from prosecuting her counterclaims in state court will be denied, and Vaden's counterclaim proceedings will be stayed pending the conclusion of arbitration.

C. Motion to Strike Exhibits

Vaden has moved to strike the exhibits that Discover relied on in opposing her motion for summary judgment. *See generally*, Def.'s Mot. to Strike.

Specifically, Vaden asserts that because Loeger works for DFS, and not Discover Bank, she lacks sufficient personal knowledge to enable her to testify about matters relating to Discover Bank. Def.'s Mot. to Strike 16-17.

Federal Rule of Civil Procedure 56(e) provides that "[s]upporting and opposing affidavits shall be made based on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

DFS, however, is Discover Bank's servicing affiliate and is responsible for "marketing..., credit card and other non-card loan products (including services related to credit approval, credit processing, authorization, customer service, account servicing, payment processing and collection); . . . and various other services in connection with [Discover's] bank

products." Pls.' Ex. C to Opp'n to Def.'s Mot. to Dismiss (service agreement between DFS and Discover Bank). In her capacity as an officer of DFS, therefore, Loeger has sufficient personal knowledge to testify about Discover's notice practices.

Vaden also challenges the validity of the following items of evidence submitted by Discover: (1) Vaden's Cardmember Agreement; (2) the Declaration of Ronald S. Canter; (3) the monthly memo purge list for Vaden's account; (4) the Discover Classic Card notice of amendment; and (5) the Discover Platinum Cardmember Agreement. *See generally*, Def.'s Mot. to Strike. Because the Court did not rely on these items in denying Vaden's motion for summary judgment, her motion to strike them will be denied as moot.

CONCLUSION

For the reasons discussed above, Discover's motion to compel arbitration will be granted and Vaden's motions to dismiss, for summary judgment, and to strike exhibits will be denied.

June 21, 2004
Date

/s/
William D. Quarles, Jr.
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

*

DISCOVER BANK, et al.,

*

Plaintiffs,

v. * CIVIL NO.: WDQ-03-3224

BETTY E. VADEN, *

Defendant. *

* * * * * * * * * * * * * * * * * * * *

ORDER

For the reasons discussed in the accompanying Memorandum Opinion, it is, this 21st day of June 2004, ORDERED that:

1. The Plaintiffs' motion to compel arbitration and to enjoin the Defendant from prosecuting her counterclaims in state court BE, and HEREBY IS, GRANTED IN PART AND DENIED IN PART;

2. The Plaintiffs' motion to compel arbitration BE, and HEREBY IS, GRANTED;

3. The Plaintiffs' motion to enjoin the Defendant from prosecuting her counterclaims in state court BE, and HEREBY IS, DENIED;

4. Vaden's prosecution of her counterclaims in state court BE, and HEREBY IS, STAYED pending the outcome of arbitration;

5. The Defendant's motion for summary judgment BE, and HEREBY IS, DENIED;

6. The Defendant's motion to dismiss Plaintiff Discover Bank BE, and HEREBY IS, Denied;

7. The Defendant's motion to strike exhibits BE, and HEREBY IS, DENIED;

8. This case be CLOSED; and

9. The Clerk of the Court shall send copies of this Memorandum Opinion and order to counsel for the parties.

/s/
William D. Quarles, Jr.
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 20, 2007

No. 06-1221
1:03-cv-3224-WDQ

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INCORPORATED

Plaintiffs – Appellees

v.

BETTY E. VADEN

Defendant – Apellant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Amicus Curiae

. . . . . .

JOHN R. KUCAN, JR.; TERRY COATES

Amici Curiae

- - - - - - - - - - - - - - - - -

On Petition for Rehearing and Rehearing En Banc

- - - - - - - - - - - - - - - - -

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Duncan, and Judge Goodwin.

For the Court

/s/ Patricia S. Connor

CLERK

OPPOSITION BRIEF

85

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No. 07-773

FILED
FEB 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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February 11, 2008

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QUESTION PRESENTED

Whether the court below properly ruled, under the facts presented, that the district court had jurisdiction to compel arbitration based upon its determination that the underlying dispute was (i) subject to an agreement to arbitrate and (ii) completely preempted by federal banking law.

RULE 29.6 DISCLOSURE

DFS Services LLC (f/k/a Discover Financial Services LLC f/ka Discover Financial Services, Inc.) and Discover Bank are wholly owned subsidiaries of the ultimate (publicly held) parent company, Discover Financial Services (f/k/a NOVUS Credit Services Inc.).

No publicly held company owns more than 10% of the stock of Discover Financial Services.

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BRIEF IN OPPOSITION

Respondents Discover Bank and Discover Financial Services, Inc. (together, "Discover Bank") respectfully submit this brief in opposition to the petition for certiorari.

COUNTERSTATEMENT OF THE CASE

The petition for certiorari should be denied because the court below properly applied Section 4 of the Federal Arbitration Act ("FAA") to the peculiar facts at issue and concluded, consistent with this Court's decision in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), that the district court had jurisdiction to compel arbitration of the dispute between Discover Bank and petitioner. That ruling is correct and depends upon a series of highly fact-intensive determinations that are not independently worthy of review but that could prevent this Court from resolving the issue identified by petitioner.

At the outset, petitioner is mistaken in suggesting that there is a broad conflict over whether courts may "look through" to the underlying dispute in assessing whether they have subject matter jurisdiction to compel arbitration under Section 4 of the FAA. Pet. at 19. According to petitioner, a federal court's role should be "limited to determining whether a contractual obligation [to arbitrate] exists and has been violated," and thus "the nature of the underlying dispute (*i.e.*, issues the petitioner does not ask the court to decide . . .) is irrelevant to the suit and is not part of the well-pleaded complaint." *Id.* at 20. No federal court of appeals that has examined this issue has adopted this position.

Indeed, all circuits that have addressed the issue agree that a district court may "look through" a petition to compel arbitration to the underlying dispute to assess whether the amount in controversy requirement for *diversity jurisdiction* has been satisfied. See *infra* at 10-12 (discussing cases). Indeed, Section 4 *requires* district courts to look to the "underlying dispute" because it conditions their authority to compel arbitration on a determination that they "would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising *out of the controversy between the parties.*" 9 U.S.C. § 4 (emphasis added). Petitioner offers no persuasive reason why Congress would have devised a scheme that required courts to "look through" to the underlying dispute for purposes of (i) *federal diversity jurisdiction* but not (ii) for *federal question jurisdiction*. Section 4 draws no such distinction.

To the extent that there is any dispute on the more narrow issue whether courts may "look through" to the underlying dispute to support *federal question jurisdiction*, certiorari is inappropriate at this time because, as petitioner acknowledges, the positions of the various courts of appeals are very much in flux. Indeed, a number of circuits *currently* are examining or re-examining this question. Pet. 17 (arguing that Eleventh Circuit's position "has also become unsettled"); *id.* at 18 (noting intra-circuit conflict within the Fifth Circuit); *id.* at 18 n.6 (noting that Ninth Circuit recently granted interlocutory review of this issue). Given the admitted "currency of the issue" in pending circuit appeals, *id.*, it is premature for this Court to step in while these circuits are analyzing the competing arguments about what Congress intended. Allowing those courts to examine

this legal problem would only sharpen this Court's resolution of the issue, if one ultimately is necessary.

In any event, this case is a poor vehicle to resolve any such dispute because it involves inter-related, fact-intensive determinations of whether (i) petitioner agreed to arbitrate at all, (ii) Discover Bank was the real party in interest, and (iii) petitioner's state-law claims are completely preempted by federal banking law. Pet. 8-9. On those issues, Discover Bank prevailed in the lower courts and firmly believes that those rulings were appropriate. Nevertheless, these fact-intensive determinations were essential to the lower courts' jurisdictional holdings, and likewise would inject substantial factual complexity into this Court's review. Indeed, the presence of these threshold issues, which are not independently worthy of this Court's review, could very well prevent resolution of the jurisdictional question if certiorari were granted.[1]

Finally, the fact that the claims of petitioner in this case, *i.e.*, the underlying dispute among the parties, arose in the procedural context of counterclaims first asserted in a state court action, adds yet an additional level of procedural complexity that cautions against further review. Petitioner's suggestion that this idiosyncratic procedural quirk itself creates a conflict with a prior decision of this Court is wrong. Indeed, the facts presented here do not remotely resemble the circumstances in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*,

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[1] Along these lines, although the court of appeals noted that "diversity jurisdiction is not present" in this case, Pet. App. 8a n.2, that is so only because the district court had no occasion to rule on Discover Bank's pending motion to amend in which it showed that there is diversity jurisdiction separate and apart from the federal question jurisdiction addressed below.

535 U.S. 826 (2002), which addressed appellate jurisdiction in a suit involving patent issues.

Discover Bank respectfully requests that the petition for certiorari be denied.

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Respondent Discover Bank, a federally insured bank, issued a Discover credit card to Petitioner Betty Vaden. Pet. App. 4a. In June 1999, petitioner's credit account attained Platinum status, *id.*, and, in July 1999, she was sent an amendment to her Cardmember Agreement that included a broad arbitration clause allowing either party to elect binding arbitration as the means to settle "any past, present or future claim or dispute . . . arising from or relating to" her account, her past accounts, or the enforceability of the arbitration clause, the Cardmember Agreement, or any prior agreement. *Id.* at 49a; see also *id.* at 4a-5a, 77a.

In July 2003, because petitioner failed to pay her credit card balance of over $10,000, Discover Bank's servicing affiliate, Discover Financial Services, Inc. ("DFS"), sued her for nonpayment in Maryland state court on behalf of Discover Bank. Pet. App. 5a. In response, petitioner filed class-action counterclaims against DFS based on Maryland contract law and various state anti-usury statutes. *Id.*

Invoking Section 4 of the FAA, Discover Bank and DFS filed a petition to compel arbitration in the United States District Court for the District of Maryland. Pet. App. 59a. Petitioner sought to avoid arbitration by arguing that the arbitration amendment only applied to Platinum cardholders and that she had not been a Platinum cardholder at the time the amendment was issued. *Id.* at 51a-52a.

Petitioner also disputed Discover Bank's standing to compel arbitration because she had filed her counterclaims against DFS, not Discover Bank. *Id.* at 60a-61a.

In the district court, neither party questioned whether there was subject matter jurisdiction, and the district court assumed its jurisdiction without discussion. Pet. App. 61a. The district court held that the parties had entered into a valid and enforceable arbitration agreement, *id.* at 83a-86a, and therefore granted Discover Bank's motion to compel arbitration, *id.* at 89a.

In the Fourth Circuit, petitioner argued for the first time that the district court lacked subject matter jurisdiction over Discover Bank's petition to compel arbitration. *Id.* at 61a. The Fourth Circuit rejected this argument. It looked to this Court's opinion in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), which states that "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute." 460 U.S. at 25 n.32. See Pet. App. 62a. Following *Moses H. Cone*, the court below held that "[a] federal court may therefore hear a Section 4 petition to compel arbitration if, but for the arbitration agreement, subject matter jurisdiction over the case would otherwise exist by virtue of a properly invoked federal question in the underlying dispute." *Id.* at 72a.

The court of appeals remanded the case to allow the district court to determine "several legally complex and partially fact-bound inquiries which must be answered *prior* to resolving the subject matter jurisdiction question." Pet. App. 73a (emphasis added). First, the district court was ordered to

"decide whether Ms. Vaden's state law counterclaims are completely preempted by the Federal Deposit Insurance Act," a decision that "may be affected by the court's determination as to whether Discover Bank – as opposed to merely Discover Financial Services – is a party of interest in the state law suit." *Id.* at 73a n.3 (citing Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d(a)). Next, if the district court were to find that no federal question had been stated, it was ordered "to consider the pending motion to amend and, if granting it, ascertain whether the parties are diverse and whether the other requirements of § 1332 are properly met." *Id.* Finally, the district court was directed to "reexamine whether there was a question of material fact about the existence of an arbitration agreement between these particular parties." *Id.* at 73a n.4.

Following the Fourth Circuit's original decision, petitioner did not seek review by this Court. On remand, the district court reaffirmed its previous order, ruling that the underlying dispute presented a federal question and that the court therefore had subject matter jurisdiction to compel arbitration of that dispute. Pet. App. 48a. The district court also held that the parties had entered into a valid arbitration agreement. *Id.* at 53a. Because the court ruled that it had jurisdiction based on the underlying federal question, it did not address Discover Bank's motion to amend its petition to include allegations supporting federal diversity jurisdiction.

Petitioner again appealed, and the Fourth Circuit addressed a variety of questions relating to the district court's subject matter jurisdiction. Specifically, to determine whether the underlying dispute raised a federal question, the court below first examined whether petitioner's counterclaims

had in fact been completely preempted by the FDIA. Pet. App. 11a. To answer that question, the court analyzed whether the real party in interest with respect to petitioner's claims was Discover Bank or DFS – because the FDIA applies only when the real party in interest is a bank, and DFS is not a bank under the FDIA. *Id.* at 12a-13a.

In sorting through these factual and legal issues, the court of appeals requested an amicus brief from the Federal Deposit Insurance Corporation ("FDIC") on, among other things, "whether Discover Bank was the real party in interest on these facts." Pet. App. 13a n.7. The FDIC's brief explained that (i) Discover Bank was the real party in interest under the facts presented, *id.* at 14a, and (ii) that Section 1831d "'completely preempts' state law usury claims," *id.* at 24a. In assessing the FDIC's conclusions, the court of appeals "emphasize[d] the heavily fact-dependent nature of [its] analysis," *id.* at 18a n.9, and stated that "a state-chartered, federally insured bank will not always be the real party in interest for purposes of invoking the FDIA," *id.* Under the facts presented here, however, the court of appeals concluded that Discover Bank is, in fact, the real party in interest, *id.* at 13a-18a, and that petitioner's claims were "completely preempted," *id.* at 18a-25a.

Finally, the court of appeals rejected petitioner's argument that the parties had not entered into the arbitration agreement. Pet. App. 25a-28a. Affirming the findings of the district court, the Fourth Circuit granted Discover Bank's motion to compel arbitration. *Id.* at 28a. One judge dissented. *Id.*

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY APPLIED SECTION 4 OF THE FAA TO THE FACTS OF THIS CASE TO HOLD THAT THE DISTRICT COURT HAD JURISDICTION TO COMPEL ARBITRATION.

Review should be denied because the decision below properly and faithfully applied the governing statute and decisional law of this Court.

1. Section 4 of the FAA permits a party to file a petition to compel arbitration in any federal district court that "save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. The plain meaning of the language chosen by Congress is that a court's jurisdiction to compel arbitration under Section 4 of the FAA depends on whether the Court would have subject matter jurisdiction over a suit arising out of the underlying controversy between the parties. See *Moses H. Cone*, 460 U.S. at 25 n.32 ("Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute").

The procedural posture in this case mirrors the circumstances in *Moses H. Cone*, where this Court held that it had jurisdiction to consider an appeal from an order in a Section 4 suit to compel arbitration of an underlying state-law contract dispute. See 460 U.S. at 7, 13.[2] There, one party had advanced state law claims in state court, and the

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[2] The jurisdictional issue addressed by this Court was the appealability of the district court's order under 28 U.S.C. § 1291.

opposing party brought an action in federal district court to compel arbitration of the state law dispute. *Id.* at 7. The district court exercised jurisdiction over the Section 4 suit based on diversity of citizenship, *id.*, and this Court acknowledged that the district court's jurisdiction to compel arbitration required it to determine whether it would have jurisdiction over the suit on the underlying dispute, based on "diversity of citizenship or some other independent basis for federal jurisdiction." *Id.* at 25 n.32.

Following that same approach, the court below applied its prior ruling in this case and looked to see if the underlying dispute "presents a federal question." Pet. App. 3a. It conducted a "highly fact-dependent . . . analysis," concluded that "Discover Bank is the real party in interest," *id.* at 18a & n.9, and ruled the "FDIA 'completely preempts' state usury claims against a state-chartered, federally insured bank that is the real party in interest of a state court dispute," *id.* at 18a; see also *id.* at 25a. Those determinations warrant no further review.

Indeed, a reading of Section 4 of the FAA that prohibited courts from "looking through" to the underlying dispute for which arbitration was sought would render Section 4 virtually meaningless as a method for compelling arbitration through an independent action in federal court. According to petitioner, the role of a court reviewing an independent proceeding to compel under Section 4 "is limited to determining whether a contractual obligation [to arbitrate] exists and has been violated" and therefore "the nature of the underlying dispute (*i.e.*, issues the petitioner does not ask the federal court to decide and, in fact, claims it cannot decide) is irrelevant to the suit and is not part of the well-pleaded complaint." Pet. 20. Under that reading,

however, a court could never even exercise federal diversity jurisdiction over a suit to compel arbitration under Section 4 because it could not "look through" to the underlying dispute to determine whether the amount in controversy were sufficient.

2. No circuit has adopted petitioner's crabbed reading of Section 4. Although petitioner suggests that the circuits disagree about whether to take a "look-through approach," see Pet. 19-20, every circuit to examine the issue agrees that a district court may, at least in some cases, "look through" a Section 4 petition to the parties' underlying dispute.

In particular, along with the Fourth Circuit in this case, the First, Fifth, and Eleventh Circuits all have "looked through" to the underlying dispute in suits under Section 4 to determine whether there was federal question jurisdiction. The Eleventh Circuit has explicitly held, based on the text of Section 4, that "it is appropriate for us to 'look through' [the] arbitration request at the underlying licensing dispute in order to determine whether [the] complaint states a federal question" to support subject matter jurisdiction. *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999). Similarly, as petitioner acknowledges, see Pet. 13 n.4, 16, both the First Circuit and Fifth Circuit have "looked through" a Section 4 petition to determine whether the underlying dispute raised a federal question that would provide subject matter jurisdiction. See *PCS 2000 LP* v. *Romulus Telecomms., Inc.*, 148 F.3d 32, 34-35 (1st Cir. 1998); *Rio Grande Underwriters, Inc.* v. *Pitts Farms, Inc.*, 276 F.3d 683, 685 (5th Cir. 2001). Indeed, the Fifth Circuit, in *Rio Grande Underwriters*, a case remarkably similar to the instant case, reviewed a district court's subject

matter jurisdiction over a Section 4 petition by looking through the petition to determine whether the underlying dispute – a state law dispute in state court – presented a federal question because the area of law was completely preempted by the Federal Crop Insurance Act. *Id.*[3]

Further, the circuit courts identified by petitioner as taking a contrary approach, Pet. 12, also allow district courts to "look through" the Section 4 petition to the underlying dispute in at least some circumstances. For example, the Seventh Circuit, "[i]n the context of actions to compel arbitration, [has] adhered to the rule that, in order to ascertain whether the jurisdictional amount for the diversity statute has been met, the appropriate focus is the stakes of the *underlying arbitration dispute.*" *America's MoneyLine, Inc.* v. *Coleman*, 360 F.3d 782, 786 (7th Cir. 2004) (emphasis added). Similarly, the Sixth Circuit has held that a district court has jurisdiction over a complaint filed under Section 4 when the parties have diverse citizenship and the amount in controversy in the *underlying claim* is sufficient. *Smith Barney, Inc.* v. *Sarver*, 108 F.3d 92. 95 & n.3 (6th Cir. 1997). Likewise, the Second Circuit acknowledges that a federal district court may exercise jurisdiction over a Section 4 petition if it finds that the requirements for diversity jurisdiction have been met. *Westmoreland Capital Corp.* v.

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[3] In an earlier decision, the Fifth Circuit held that "federal question jurisdiction cannot be derived from the underlying dispute to be arbitrated." *Prudential-Bache Secs., Inc.* v. *Fitch*, 966 F.2d 981, 988 (5th Cir. 1992). Of course, resolution of any such intra-circuit conflict is not a matter of concern to this Court and is best left to the Fifth Circuit. *See* Eugene Gressman et al., *Supreme Court Practice* at 253-54 (9th ed. 2007) (citing *Davis* v. *United States*, 417 U.S. 333, 340 (1974)).

Findlay, 100 F.3d 263, 268 (2d Cir. 1996). Put simply, consistent with this Court's statements in *Moses H. Cone*, 460 U.S. at 25 n.32, no circuit categorically prohibits district courts from "looking through" Section 4 petitions to the underlying disputes when assessing their jurisdiction.

Although the Second, Sixth, and Seventh Circuits allow district courts to "look through" to the underlying dispute in assessing the amount in controversy for purposes of diversity jurisdiction, petitioner argues, Pet. 12-15, that these courts take a different approach to federal question jurisdiction under Section 4. See *Westmoreland*, 100 F.3d at 268; *Wisconsin* v. *Ho-Chunk Nation*, 463 F.3d 655, 659 (7th Cir. 2006); *Smith Barney*, 108 F.3d at 95 (dicta).[4] As such, the only claimed dispute among the circuits is whether a district court not only can "look through" to the underlying dispute to support diversity jurisdiction but also can do so to support federal question jurisdiction.[5]

On this narrow issue, review would be premature because the law in this area is rapidly evolving

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[4] In *Smith Barney*, the Sixth Circuit held that there was jurisdiction based upon diversity because the parties were diverse and the damages claimed in the underlying dispute were greater than the jurisdictional minimum. 108 F.3d at 95. Here too, Discover Bank has argued that there is diversity jurisdiction in this case, Pet. App. 73a n.3, but the district court had no occasion to address that issue because it concluded that there was federal question jurisdiction, *id.* at 48a & n.5 (exercising federal question and supplemental jurisdiction).

[5] Of course, it makes little sense to think that Congress intended courts to "look through" petitions to the underlying dispute if they support federal diversity jurisdiction but to prevent such an analysis where, as here, the basis for jurisdiction is federal question.

within the federal circuits. Although the Fifth Circuit once ruled that a federal question in the underlying dispute was an insufficient ground on which to base jurisdiction, *Prudential-Bache Securities* v. *Fitch*, 966 F.2d 981, 988 (5th Cir. 1992), a more recent panel takes the same approach as the Fourth Circuit in this case. See *Rio Grande Underwriters*, 276 F.3d at 685. As petitioner recognizes, see Pet. 11 n.2, the Ninth Circuit has an appeal pending in which it will likely address jurisdiction under Section 4 of the FAA. See *In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M:06-cv-01781-SBA, 2007 WL 1302496 (N.D. Cal. May 2, 2007), *interlocutory appeal granted*, No. 07-80046 (9th Cir. July 24, 2007). Likewise, the Eleventh Circuit will be reviewing *en banc* its prior position on this jurisdictional question. See *Community State Bank* v. *Strong*, 485 F.3d 597 (11th Cir.), *reh'g en banc granted*, 508 F.3d 576 (11th Cir. Sept. 10, 2007).

With all the attention that this question is receiving in the federal circuits, the opportunity for consensus is real and should be allowed to develop. At a minimum, this Court would benefit from the product of the ongoing debate among the circuits on this issue, if the question ultimately warrants resolution by this Court.

3. In all events, on the narrow issue presented, this case is an inappropriate vehicle because the determination of subject matter jurisdiction is itself based on fact-intensive analyses of whether (i) there is an agreement to arbitrate and (ii) the underlying dispute is completely preempted based upon the peculiar facts as applied to relevant federal banking statutes. As such, review is not warranted because this case involves issues that likely would require the

Court to delve into complex factual questions that may prevent the Court from actually addressing the scope of Section 4 altogether. See Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007) ("If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review.") (citing *Sanson Hosiery Mills* v. *NLRB*, 344 U.S. 863 (1952); *Arlington Inc.* v. *Mayer*, 339 U.S. 965 (1950)).

Moreover, petitioner does not and cannot suggest that these threshold issues are independently worthy of the Court's review. Specifically, the jurisdictional holding below depends upon the conclusion that an agreement to arbitrate applies to petitioner's counterclaims filed in state court because (i) Discover Bank is the real party in interest, Pet. App. 13a-18a, (ii) these state law claims against this real party in interest are completely preempted by federal banking law under these specific circumstances, *id.* at 18a-25a, and (iii) there is a binding agreement to arbitrate these claims, *id.* at 25a-27a.

In particular, as the court below acknowledged, the question whether Discover Bank is the real party in interest is "heavily fact-dependent." Pet. App. 18a n.9. And even though petitioner below conceded that if Discover Bank were the real party in interest then the FDIA "completely preempted her state-law claims," this Court would need to address these legal and factual issues because "a party may not create jurisdiction by concession." *Id.* at 18a n.10. Likewise, both the district court, *id.* at 48a-53a, and court of appeals, *id.* at 25a-27a, devoted significant effort to resolving petitioner's factual claim that she had not entered into an agreement to arbitrate at all.

The questions about whether an agreement to arbitrate exists, whether Discover Bank is the real party in interest, and whether petitioner's claims are completely preempted stand as serious obstacles to this Court's review of the principal issue presented by petitioner. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."). Resolution of any conflict on the interpretation of Section 4 can and should await an appropriate vehicle—one in which there is no danger that a variety of other issues, not worthy of review, would render the grant of certiorari improvident.

II. THERE IS NO CONFLICT WITH THIS COURT'S DECISION IN *HOLMES GROUP*.

With regard to her second question presented, petitioner does not and can not contend that there is any circuit conflict. Rather, petitioner argues that the decision below conflicts with this Court's opinion in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002). The alleged conflict, however, is illusory as *Holmes Group* did not purport to address Section 4 of the FAA.

In *Holmes Group*, this Court considered whether the Federal Circuit has appellate jurisdiction over an appeal from a district court in which a patent-law claim was raised only in the context of the defendant's counterclaim. 535 U.S. at 827. The Court concluded that, because the patent-law claim in that case was not part of the plaintiff's well-pleaded complaint, the action did not arise under federal patent law, and the Federal Circuit was thus without jurisdiction to entertain the appeal. *Id.* at 829-32.

Petitioner argues, by analogy from *Holmes Group* to the facts in this case, suggesting that there is no federal question jurisdiction "arising out of the controversy between the parties," 9 U.S.C. § 4, because it is her state-court *counterclaims* that would invoke federal question jurisdiction through complete preemption. Pet. 27-30. There is, however, no conflict between the decision below and this Court's decision in *Holmes Group*.

As noted, *Holmes Group* addresses the issue of the Federal Circuit's appellate jurisdiction over a patent appeal and thus is silent about jurisdiction under Section 4 of the FAA. 535 U.S. at 829-32. Further, as explained by the Fourth Circuit, *Holmes Group* did not involve "complete preemption" and thus does not speak to the central issue of federal question jurisdiction in this case. Pet. App. 10a n.4. Moreover, to the extent *Holmes Group* is premised on the policy underlying the well-pleaded complaint rule that a "plaintiff is 'the master of the complaint,'" 535 U.S. at 831, that concern is absent here because Discover Bank is both the state-court plaintiff and the party seeking to compel arbitration in federal court. Pet. App. 10a n.4. There is thus no danger in this case of the defendant's counterclaims depriving Discover Bank of its chosen forum. *Id.*

More to the point, the decision in *Holmes Group* is inapplicable here because the authority of a federal court to compel arbitration under Section 4 of the FAA does not depend upon the existence of *any* lawsuit on the underlying dispute. Indeed, by its terms, Section 4 is a vehicle to compel arbitration when an opposing party refuses to do so. As such, "Section 4 does not require a party to actually file suit regarding the underlying controversy." Pet. App. 7a. Thus, the fact that the underlying dispute was set

forth in a counterclaim filed in a state-law action rather than an affirmative claim in a complaint is irrelevant to the question of whether Discover Bank may compel arbitration pursuant to Section 4.

As this Court made clear in *Moses H. Cone*, Sections 3 and 4 of the FAA are "parallel devices for enforcing an arbitration agreement." 460 U.S. at 22. Whereas Section 3 cannot be invoked to stay a pending lawsuit "unless there is such a suit in existence," Section 4 requires only that the "federal district court *would have* jurisdiction over *a suit* on the underlying dispute." *Id.* at 25 n.32 (emphasis added). So long as there would be federal jurisdiction over a lawsuit to resolve the parties' underlying dispute, Section 4 may be invoked to compel arbitration. As such, under Section 4, it does not matter whether the underlying dispute is set forth in a complaint, a counterclaim, or in no suit at all.

There is, accordingly, no conflict between the decision below and *Holmes Group*.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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I. The Conflict in the Courts of Appeals Warrants Certiorari

As the petition explained, Pet. 11-18, there is a sharp and persistent conflict among the courts of appeals—recently acknowledged by courts on both sides—as to whether, under 28 U.S.C. § 1331, a federal court may take jurisdiction over a petition to compel arbitration, see 9 U.S.C. § 4, that does not on its face raise any federal question. In the decisions below, the Fourth Circuit, agreeing with two other circuits, held that a suit seeking to compel arbitration "arises under" federal law whenever the issue on which arbitration is sought is federal in character. Four other circuits, however, have squarely rejected this look-through approach to § 1331.

The brief in opposition does not—and cannot—deny the existence of this square circuit conflict. Nor does it gainsay the practical importance of the question presented or dispute the obvious vice of the look-through approach—that, as here, years of federal court litigation can be devoted to a multi-layered "jurisdictional" determination in a suit with no federal question for the court to decide. Instead, the opposition strains mightily to *avoid* the questions presented, guiding the Court through a lengthy detour, Br. in Opp. 10-12, surveying decisions involving jurisdiction over § 4 petitions under the *diversity* statute, 28 U.S.C. § 1332. These cases do nothing to dissipate the very real conflict as to federal question jurisdiction and, to the (minimal) extent they bear on the issue resolved below, they undermine, rather than support, the Fourth Circuit rule.

As for the question *actually* presented, respondents' arguments against certiorari are insubstantial.

They first contend that this Court's resolution of the question would somehow benefit from allowing *even more* lower courts to choose one side or the other of the already deep and intractable circuit split. Br. in Opp. 12-13. They then claim even more implausibly that factual weaknesses in their own claim to jurisdiction might present barriers to this Court's reviewing—and correcting—the Fourth Circuit's look-through rule. *Id.* at 13-15. Respondents are entirely wrong on both counts.

1. Respondents' sustained effort to submerge the clear circuit split over federal question jurisdiction in a sea of discussion of diversity-of-citizenship cases should not distract this Court. As the decision below succinctly noted, the question of diversity jurisdiction "*is not present*," Pet. App. 8a n.2 (emphasis added), in this case. The question that divided the Fourth Circuit panel below and has splintered courts of appeals nationwide is whether a suit seeking to enforce a contractual arbitration right "arises under" federal law whenever the issue to be arbitrated is federal in character. Even if respondents were right in their reading of the diversity cases, federal courts' (supposedly) uniform approach to § 1332 would be no reason at all for this Court to ignore their indisputably *divergent* interpretations of § 1331.

But respondents are not right about diversity jurisdiction. Their assertion that courts look through pleadings to find the amount in controversy, Br. in Opp. 10-12, is unsupported by the very cases they cite. Thus, in *America's MoneyLine, Inc.* v. *Coleman*, 360 F.3d 782 (7th Cir. 2004) (see Br. in Opp. 11), the Seventh Circuit explained that "there [was] no basis for concluding that the district court should look to any source other than the petition in order to deter-

mine whether the requisite jurisdictional amount has been met," *id.* at 785, finding "no indication that Section 4 * * * altered in any way the rule that federal courts look only to the well-pleaded complaint * * * in determining their jurisdiction," *id.* at 785-786. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983) (see Br. in Opp. 8-9) is no more availing. There, the party suing to compel arbitration alleged diversity of citizenship and the amount in controversy *on the face of the petition.* See Petition ¶ 1, *Mercury Constr. Corp.* v. *Moses H. Cone Mem'l Hosp.*, No. 80-586 (M.D.N.C. Dec. 24, 1980). Thus, to the extent that case law concerning diversity jurisdiction is at all relevant, it bolsters those cases holding *against* the Fourth Circuit that the well-pleaded complaint rule applies to § 4 petitions as it applies to other civil suits.

2. Tellingly, when respondents do turn to the question actually presented they do not even attempt to square the decision below with those of the Second, Sixth, and Seventh Circuits. As explained in the petition, Pet. 11-15, each of these courts has held that 28 U.S.C. § 1331 does *not* allow a district court to "look through" pleadings that do not themselves contain a federal question, even when the issue to be arbitrated is federal in character. See *Wisconsin* v. *Ho-Chunk Nation*, 463 F.3d 655, 660 (7th Cir. 2006); *Smith Barney, Inc.* v. *Sarver*, 108 F.3d 92, 94 (6th Cir. 1997); *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263, 268 (2d Cir. 1996). Respondents likewise concede, Br. in Opp. 10, that the First and Eleventh Circuits have taken the directly opposite view, joining the Fourth Circuit in holding that a federal court *should* look through the pleadings and take jurisdiction based on the presence of a federal issue in

the underlying dispute. See *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999); *PCS 2000 LP* v. *Romulus Telecomms., Inc.*, 148 F.3d 32, 34-35 (1st Cir. 1998).

Unable to cast any doubt on this clear, sharp, and entrenched disagreement, respondents devote significant energy to quibbling over which side of the split the Fifth Circuit belongs on. For reasons explained in the petition, respondents are wrong to claim (Br. in Opp. 10-11 & n.3, 13) that the Fifth Circuit's decision in *Rio Grande Underwriters, Inc.* v. *Pitts Farms, Inc.*, 276 F.3d 683 (2001), overruled *Prudential-Bache Securities, Inc.* v. *Fitch*, 966 F.2d 981 (1992), in which the court definitively rejected the look-through approach. See Pet. 13 n.4 (describing Fifth Circuit's strict "prior panel" rule). But even if respondents' understanding of Fifth Circuit law were correct, that would merely transform this undisputed conflict from a four-to-three split against the Fourth Circuit into a three-to-four split in its favor. The courts of appeals would still remain closely and irreconcilably divided and this Court's review would be no less essential.[1]

3. Unable to explain away either the existence or the importance of the square conflict, respondents raise a curious claim that review of the Fourth Cir-

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[1] Respondents' observation that internal conflict within the Fifth Circuit could be addressed by *en banc* proceedings, Br. in Opp. 11 n.3, is altogether beside the point. Although there is no genuine uncertainty as to what a district court of that circuit *should* do (*i.e.*, follow the earlier-decided *Prudential-Bache* unless and until that case is overruled by the full court), what *Prudential-Bache* and *Rio Grande do* highlight is the great difficulty these jurisdictional questions continue to present. See Pet. 16-18. It is this persistent and widespread confusion—not any particular intra-circuit conflict—that calls out for this Court's intervention.

cuit's decision in this case would be "premature," Br. in Opp. 12-13, noting, as did the petition, see Pet. 17, 18 n.6, that the Ninth and Eleventh Circuits have pending cases that raise the look-through issue and suggesting that a "consensus," Br. in Opp. 13, might emerge were the Court to stay its hand here.

The claim that these cases provide an "opportunity for consensus," Br. in Opp. 13, is simply counterfactual. Even if both courts were to follow respondents' favored approach, the circuits would still be evenly split, four-to-four. (Adding the erroneously claimed Fifth Circuit defection would make it only three-to-five). Letting a circuit conflict percolate is one thing; allowing it to fester is quite another.

Even respondents' modest claim that this Court would "benefit" from allowing "debate" in the lower courts to continue, Br. in Opp. 13, is a hollow one. The arguments for and against the Fourth Circuit rule have been fully and comprehensively aired in recent opinions taking both sides of the issue. Judge Wilkinson's opinion in *Vaden I* expressly recognized the existence of a circuit split, Pet. App. 62a-63a, and responded directly to the rationales of those courts that have applied the well-pleaded petition rule, *id.* at 65a n.2, 67a-71a. Judge Marcus continued this debate when he took the unusual step of writing a lengthy opinion "specially concurring" in his own opinion for the court in *Community State Bank* v. *Strong*, 485 F.3d 597 (11th Cir.), reh'g en banc granted, 508 F.3d 576 (11th Cir. 2007), in which he considered—and refuted—with scholarly precision each of the arguments advanced by Judge Wilkinson. Finally, the Fourth Circuit reaffirmed its look-through approach in *Vaden II* in the face of a dissenting opinion that advanced many of Judge Marcus's

arguments. See Pet. App. 38a-39a (Goodwin, J., dissenting). Although everything on the look-through issue has already been said, respondents would postpone review until every circuit has said it.[2]

Not only are the supposed benefits of further percolation illusory, but the costs of allowing the Fourth Circuit rule to stand are large and serious. As the petition explained, Pet. 22-23, the Fourth Circuit rule promises to produce costly and inefficient litigation on the threshold question of subject matter jurisdiction, requiring federal courts to examine in detail issues that closely track the merits of the underlying dispute (and that the FAA reserves to the arbitrator) in suits where the "merits" question sounds in state, not federal, law. See *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994). If the Fourth Circuit decision were to stand, this case's convoluted path to the jurisdictional threshold—it required the attention of five federal judges and produced five separate opinions over four years of litigation—would hardly be unique. To the contrary, the large volume of arbitration cases filed each year, see Pet. 32-35, ensures that the costly inquiries the look-through rule necessitates

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[2] Denying review now would also waste a unique opportunity to address the scope of any look-through jurisdiction. While resolving the propriety of look-through jurisdiction is itself sufficient reason to grant review, this case would also allow the Court—if it were to agree with respondents' position on the first question presented—to address the question of *how far* a federal court may permissibly look through. See Pet. 34-35. That question would be crucial to cabining the look-through approach's intrusion on the state courts and respondents have not identified any case pending in the lower courts that would provide a similar opportunity to address it.

will take place on a grand scale in the lower federal courts.[3]

4. Respondents' arguments that this case is a "poor vehicle" and their professed concern that "fact-intensive determinations" might "prevent resolution of the jurisdictional question if certiorari were granted," Br. in Opp. 3, are red herrings.

Leaving aside the oddity of respondents' arguing against certiorari by raising doubts about the correctness of lower court rulings in their favor, this Court can resolve the look-through jurisdiction questions without re-deciding any other jurisdictional determination. As recent cases make clear, federal courts are not obliged to decide *every* jurisdictional issue a case raises, see *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007); *Ruhrgas A.G.* v. *Marathon Oil Co.*, 526 U.S. 574, 584-585 (1999), and *this Court's* jurisdiction is not confined to cases that satisfy 28 U.S.C. § 1331's well-pleaded complaint rule. See *United States* v. *Corrick*, 298 U.S. 435, 440 (1936); *cf. Asarco Inc.* v. *Kadish*, 490 U.S. 605, 623-624 (1989). None of the narrow determinations respondents highlight, see Br. in Opp.

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[3] The pending Ninth Circuit case on which respondents rely, Br. in Opp. 13, illustrates the perils of continued percolation. See *In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M:06-cv-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007), interlocutory appeal granted, No. 07-80046 (9th Cir. July 24, 2007). That case, a multidistrict litigation proceeding, involves multiple stand-alone § 4 petitions in which jurisdiction purportedly stems from federal issues in the underlying dispute. An incorrect decision by the Ninth Circuit in this appeal alone would impose further wasteful costs in 70 different cases.

14, is prerequisite to this Court's deciding the extent, if any, § 1331 allows look-through jurisdiction.[4]

Indeed, respondents' theory would preclude review of *nearly any* jurisdictional decision involving a § 4 petition. Fact-bound threshold questions as to whether an arbitration agreement exists or whether a party has refused to arbitrate are present whenever a petition to compel is filed. Far from presenting "serious obstacles," Br. in Opp. 13-15, these issues in fact raise no barrier to this Court's deciding the threshold legal issues presented here.

II. The Second Decision Below is Irreconcilable with This Court's Decision in *Holmes Group*

As the petition explained, the second decision below fails even on the Fourth Circuit's own logic. Pet. 26-32. A look-through approach requires federal courts to determine whether they would have subject matter jurisdiction over the underlying dispute. But here the only federal issues were injected by petitioner's *counter*claim, and this Court's decision in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems*, 535 U.S. 826 (2002), makes clear that federal counterclaims cannot supply "arising under" jurisdiction. Respondents' attempts to reconcile the decision below with *Holmes Group* are wholly unpersuasive

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[4] Respondents obliquely suggest that their claims of diversity jurisdiction, never ruled on in the courts below, should bar this Court from reviewing this case. Br. in Opp. 3 n.1, 12 n.4. But this Court has not hesitated to resolve jurisdictional issues ruled on below while remanding additional jurisdictional questions not decided on appeal. See, *e.g.*, *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 197 (1990).

and *Vaden II* opens federal courts to disputes still further from the bounds envisioned by § 1331.

1. Respondents' contention that *Holmes Group* is irrelevant because it involved appellate jurisdiction over a patent claim and not a § 4 petition, Br. in Opp. 16, is little more than makeweight. Although *Holmes Group* involved 28 U.S.C. § 1338(a), the Court explained that "linguistic consistency" requires the "same test to determine whether a case arises under § 1338(a) as under § 1331," 535 U.S. at 830 (citation omitted), and its conclusion that counterclaims cannot supply "arising under" jurisdiction was not limited to patent appeals.[5] In cases like this one, where the asserted basis for jurisdiction is a federal issue, *Holmes Group*'s construction of § 1331 is directly applicable.

2. Similarly, respondents fail to explain why the "complete preemption" doctrine should make any jurisdictional difference. As the petition explained, under complete preemption a state law claim is treated, for jurisdictional purposes, *as if* it were federal in character. Pet. 29 n.10; see *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 393 (1987). But *Holmes Group* made clear that (actual) federal-law counterclaims cannot supply "arising under" jurisdiction, and neither respondents nor the majority below, see Pet. App. 9a-10a, have advanced any explanation why state law claims "federalized" through complete preemption should receive uniquely favorable treatment.

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[5] The lower federal courts have had no difficulty making the straightforward connection that eludes respondents' grasp. See, *e.g.*, *Topeka Hous. Auth.* v. *Johnson*, 404 F.3d 1245, 1247 (10th Cir. 2005); *Salton, Inc.* v. *Phillips Domestic Appliances & Personal Care B.V.*, 391 F.3d 871, 875 (7th Cir. 2004).

3. Equally unpersuasive is respondents' attempt to mitigate the conflict with *Holmes Group* on the ground that, under the decision below, Discover would remain "master of the complaint." Br. in Opp. 16. The federal system's respect for a plaintiff's *initial* choice of forum has never been a license to move litigation piecemeal back and forth between court systems. See *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 106 n.2 (1941) ("[I]t is believed to be just and proper to require the plaintiff to abide his selection of a forum.") (quoting H.R. Rep. No. 1078, 49th Cong., 1st Sess. 1 (1887)); *Syngenta Crop Protection, Inc.* v. *Henson*, 537 U.S. 28, 32 (2002). And the control recognized in *Holmes Group* hardly justifies permitting respondents to veto their *own* initial forum choice, especially where the state court is equally able to afford the arbitration remedy they seek.

Of course, preserving "plaintiff's choice of forum," 535 U.S. at 832, was only one consideration at work in *Holmes Group*. Just as important were "the clarity and ease of administration of the well-pleaded-complaint doctrine," *ibid.*, and a "due regard for the rightful independence of state governments," *ibid.* (quoting *Shamrock Oil*, 313 U.S. at 109), both of which militate decisively *against* jurisdiction in situations like this one. See Pet. 29-31. That a plaintiff may seek to compel arbitration in the absence of "*any* lawsuit," Br. in Opp. 16, does not, as respondents presume, establish that the pendency of a suit—brought by that party—is irrelevant. See, *e.g.*, *Or. Egg Producers* v. *Andrew*, 458 F.2d 382, 383 (9th Cir. 1972) ("A plaintiff who commences his action in a state court cannot effectuate removal to a federal court even if he could have originated the action in a fed-

eral court and even if a counterclaim is thereafter filed that states a claim cognizable in a federal court."). Indeed, in cases under the Declaratory Judgment Act—a context the *Fourth Circuit* maintained was closely analogous, Pet. App. 68a-70a—federal courts typically *refuse* to entertain actions once a state suit is pending, especially one instituted by the would-be federal plaintiff. See 10B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2758, at 523 (3rd ed. 1998); *Am. Auto. Ins. Co.* v. *Freundt*, 103 F.2d 613, 617 (7th Cir. 1939) (Declaratory Judgment Act does not allow plaintiffs to "accomplish in a particular case what could not be accomplished under the removal act"). And declaratory judgment actions implicate a basic jurisdictional policy consideration–that federal courts are the primary expositors of federal law—that § 4 petitions do not.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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JOINT APPENDIX

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BETTY E. VADEN,

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v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OPINIONS, JUDGMENTS AND ORDERS CONTAINED IN THE PETITION APPENDIX

The following opinions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1848

Discover Bank, et al., Plaintiff-Appellee,

v.

Betty E. Vaden, Defendant-Appellant.

Appeal from District of Maryland, Baltimore

Date	Docket #	Proceedings
7/14/2004	1	Civil case docketed.
		* * * * *
08/24/2004	28	Brief and joint appendix filed by Appellant Betty E. Vaden. * * *
09/27/2004	35	Brief filed by Appellee Discover Bank, Appellee Discover Financial. * * *
09/27/2004	37	Motion filed by Appellee Discover Bank, Appellee Discover Financial to amend the record on appeal (motion titled "amend verified complaint") * * *
09/28/2004	38	Response/answer requested to motion to amend the record (titled "amend verified com-

		plaint") * * *
		* * * * *
10/06/2004	40	Response/answer filed * * * by Appellant Betty E. Vaden to motion to amend the record * * *
10/08/2004	42	ORDER FILED * * * deferring action on motion to amend the record pending assignment of case to oral argument panel. * * *
10/12/2004	43	Reply filed by Appellee Discover Bank, Appellee Discover Financial to motion to amend the record (document titled "reply brief in further support of motion to amend verified petition") * * *
10/14/2004	45	Reply brief filed by Appellant Betty E. Vaden.* * *
10/15/2004	44	Case calendared for oral argument. Case calendared for oral argument on: 12/1/04. * * *
10/25/2004	52	COURT ORDER filed * * * deferring action on motion to amend the record * * * until the time of oral argument * * *
10/29/2004	56	Letter filed by Appellee. * * *
		* * * * *
12/01/2004	60	Oral argument heard. Panel: Honorable J. H. Wilkinson, Honorable William B. Traxler, Honorable Allyson K. Duncan.

		* * *
01/24/2005	67	Opinion ruling terminating motion (per PSC) to amend the record * * * See footnote #3 . * * *
01/24/2005	68	Published, authored opinion filed. * * * [04-1848]
01/24/2005	69	Judgment order filed. Decision: vacated and remanded. EOD Date: 1/24/05. * * *
02/15/2005	71	Mandate issued. * * * [04-1848]
* * * * *		

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1221

Discover Bank, et al., Plaintiff-Appellee,

v.

Betty E. Vaden, Defendant-Appellant.

Appeal from District of Maryland, Baltimore

Date	Docket #	Proceedings
* * * * *		
02/23/2006	14	Docketing statement filed by Appellant Betty E. Vaden * * *
02/27/2006	1	Civil case docketed.
* * * * *		
03/02/2006	11	Objection filed by Appellee Discover Bank, Appellee Discover Financial to appellant's docketing statement. * * *
* * * * *		
04/14/2006	23	Brief and joint appendix filed by Appellant Betty E. Vaden. * * *
05/17/2006	26	Brief filed by Appellee Dis-

		cover Bank, Appellee Discover Financial. * * *
06/05/2006	28	Reply brief filed by Appellant Betty E. Vaden. * * *
* * * * *		
09/29/2006	41	Case calendared for oral argument. Case calendared for oral argument on: 11/29/06. [06-1221] * * *
* * * * *		
11/29/2006	43	Oral argument heard. Panel: Honorable J. H. Wilkinson, Honorable Allyson K. Duncan, Honorable Joseph R. Goodwin. John Andrew Mattingly for Appellant Betty E. Vaden, Appellee Discover Financial, Appellee Discover Bank, Martin C. Bryce for Appellee Discover Financial, Appellee Discover Bank Courtroom Deputy: SCC. [06-1221]
12/06/2006	45	COURT ORDER [4503046] to file amicus brief. * * * Amicus brief due 1/5/07 for FDIC. Copies to all parties. * * *
12/21/2006	47	Motion filed by FDIC to extend time to file amicus curiae brief until 2/2/07 * * *
12/22/2006	52	COURT ORDER filed * * *

		granting motion to extend time to file am br * * *
01/31/2007	54	Motion filed by Amicus Curiae FDIC to extend time to file amicus curiae brief until 2/9/07 * * *
02/01/2007	57	Motion filed by Potential Amicus Curiae John R. Kucan, Potential Amicus Curiae Terry Coates to file amicus brief. * * *
02/05/2007	61	COURT ORDER filed * * * granting motion to extend time to file am br * * *
02/09/2007	70	Amicus curiae brief filed by Amicus Curiae FDIC * * *
02/12/2007	67	COURT ORDER filed * * * granting motion to file amicus brief * * *
02/12/2007	68	Amicus curiae brief filed by Amicus Curiae John R. Kucan, Amicus Curiae Terry Coates * * *
02/16/2007	73	COURT ORDER filed * * * requesting response to * * * amicus curiae brief(s) * * *.
02/16/2007	74	Motion filed by Appellee Discover Bank, Appellee Discover Financial * * * for leave to file response to amicus curiae brief(s) * * *
02/16/2007	75	Informal action taken mooting motion for leave to file

		response * * *
02/16/2007	77	Response/answer filed * * * by Appellee Discover Bank, Appellee Discover Financial to amicus curiae brief(s) * * *
* * * * *		
03/02/2007	82	Response/answer filed * * * by Appellant Betty E. Vaden to amicus curiae brief(s) * * *
* * * * *		
04/25/2007	87	Supplemental authorities (FRAP 28(j)) filed by Appellee Discover Bank, Appellee Discover Financial * * *
* * * * *		
06/13/2007	100	Published, authored opinion filed. Copies to all parties. [06-1221]
06/13/2007	101	Judgment order filed. Decision: AFFIRMED. EOD Date: 6/13/07. * * *
06/26/2007	102	Bill of costs filed by appellees Discovery Bank and Discover Financial Services. * * *
06/27/2007	103	Petition filed by Appellant Betty E. Vaden for rehearing. * * *
07/10/2007	105	COURT ORDER filed * * * denying motion for rehearing * * * EOD Date: 7/10/07;

		denying motion for rehearing en banc * * * EOD Date: 7/10/07. Copies to all parties. * * *
07/18/2007	106	Mandate issued. * * *
07/18/2007	107	ORDER filed awarding costs in the amount of $296.00. * * *
10/01/2007	108	Notice of Supreme Court action taken. Type of action taken: extension of time granted to 12/7/07. [06-1221]
03/26/2008	109	SUPREME COURT REMARK--petition for writ of certiorari granted. Action 1 Disposition Date: 03/17/2008 [06-1221]

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(BALTIMORE)

No. 1:03-cv-03224-WDQ

Discover Bank, et al., Plaintiff,

v.

Betty E. Vaden, Defendant.

Date	Docket #	Proceedings
11/12/2003	1	COMPLAINT against Betty E. Vaden (Filing fee $ 150 receipt number 1199416.), filed by Discover Bank, Discover Financial Services, Inc. * * * (Entered: 11/13/2003)
11/13/2003	2	Summons Issued (30 days) as to Betty E. Vaden. * * * (Entered: 11/13/2003)
11/17/2003	3	SUMMONS Returned Executed by Discover Bank, Discover Financial Services, Inc. Betty E. Vaden served on 11/15/2003, answer due 12/5/2003. (Wagman, Mat-

		thew) (Entered: 11/17/2003)
11/17/2003	4	JURY TRIAL DEMAND by Betty E. Vaden. (Attachments: #1 Affidavit (Mattingly, John) (Entered 11/17/2003)
11/26/2003	5	Correspondence re: Defendant's Demand for Jury Trial (Wagman, Matthew) (Entered: 11/26/2003)
12/04/2003	6	ANSWER to Complaint with Jury Demand by Betty E. Vaden.(Mattingly, John) (Entered: 12/04/2003)
12/08/2003	7	SCHEDULING ORDER: Status Report due by 4/7/2004. Signed by Judge William D Quarles Jr. on 12/8/03. (jlb, Deputy Clerk) (Entered: 12/08/2003)
12/09/2003	8	Request for Conference (Wagman, Matthew) (Entered: 12/09/2003)
12/09/2003	9	ORDER DIRECTING a Telephone Conference is necessary and to contact Chambers on or before 12/12/03 with serveral [sic] mutually convenient dates and times. Signed by Judge William D Quarles Jr. on 12/9/03. (jlb, Deputy Clerk) (Entered: 12/09/2003)

12/10/2003	10	ORDER SETTING Date for Telephone Conference. Signed by Judge William D Quarles Jr. on 12/10/03. (jlb, Deputy Clerk) (Entered: 12/10/2003)
12/11/2003	11	Correspondence re: Response to Requested Scheduling Order Modification * * * (Mattingly, John) (Entered: 12/11/2003)
12/12/2003	12	Request for Conference (Wagman, Matthew) (Entered: 12/12/2003)
12/15/2003	13	Correspondence re: Letter to Clerk, Lengthy Exhibits (Mattingly, John) (Entered: 12/15/2003)
12/15/2003	14	MOTION to Dismiss for Lack of Jurisdiction *Co-Plaintiff Discover Bank* by Betty E. Vaden. Responses due by 1/1/2004 * * *
12/15/2003	15	CERTIFICATE OF SERVICE by Betty E. Vaden (Mattingly, John) (Entered: 12/15/2003)
12/15/2003		Telephone Conference held before Judge William D Quarles Jr. (jnl, Deputy Clerk) (Entered: 12/16/2003)
12/18/2003	16	Status Report Submitted by Discover Bank, Discover Fi-

		nancial Services, Inc. * * * (Wagman, Matthew) (Entered: 12/18/2003)
12/18/2003	17	ORDER DIRECTING Opposition Briefs due 1/5/04 and any Replies due 1/19/04. Signed by Judge William D Quarles Jr. on 12/18/03. (jlb, Deputy Clerk) (Entered: 12/19/2003)
12/30/2003	18	Consent Correcting Earlier Submission * * * (Wagman, Matthew) (Entered: 12/30/2003)
12/31/2003	19	Correcting Earlier Submission (Attachments: # 1 Proposed Order)(Celeste, John) (Entered: 12/31/2003)
01/05/2004	20	ORDER MODIFYING Briefing Schedule. Signed by Judge William D Quarles Jr. on 1/5/04. (jlb, Deputy Clerk) (Entered: 01/05/2004)
01/12/2004	21	MOTION for Summary Judgment by Betty E. Vaden. Responses due by 1/29/2004 * * * (Mattingly, John) (Entered: 01/12/2004)
01/12/2004	22	RESPONSE re 17 Order, 1 Complaint, *Opposition to Plaintiffs' Petition to Compel Arbitration* filed by Betty E. Vaden.* * * (Mattingly,

		John) (Entered: 01/12/2004)
01/12/2004	23	Correspondence re: Presiding Judge's Copies Enclosed (Mattingly, John) (Entered: 01/12/2004)
01/12/2004	24	RESPONSE in Opposition re 14 MOTION to Dismiss for Lack of Jurisdiction *Co-Plaintiff Discover Bank* filed by Discover Bank, Discover Financial Services, Inc. Replies due by 1/26/2004. * * * (Wagman, Matthew) (Entered: 01/12/2004)
01/16/2004	25	ORDER Counsel for Discover Financial Services, Inc. and Discover Bank have e-filed document number 24 which, with attachments, exceeds 15 pages in length. Counsel have not submitted a paper copy of that document as required by the court's CM/ECF instructions. Counsel are directed to do so immediately by mailing or hand-delivering to chambers a paper copy of the document, together with a notice that the document has been e-filed. Signed by Judge William D Quarles Jr. on 01/16/2004. (kab, Cham-

		bers) (Entered: 01/16/2004)
01/16/2004	26	Correcting Earlier Submission (Wagman, Matthew) (Entered: 01/16/2004)
01/26/2004	27	REPLY to Response to Motion re 14 MOTION to Dismiss for Lack of Jurisdiction *Co-Plaintiff Discover Bank Memorandum & Exhibits thereto* filed by Betty E. Vaden. * * * (Mattingly, John) (Entered: 01/26/2004)
01/26/2004	28	Correspondence re: Judge Quarles Copy Enclosed (Mattingly, John) (Entered: 01/26/2004)
01/26/2004	29	Correcting Earlier Submission * * * (Mattingly, John) (Entered: 01/26/2004)
01/27/2004	30	REPLY to Response to Motion re 21 MOTION for Summary Judgment *and Reply to Defendant's Opposition to Plaintiffs' Petition to Compel Arbitration* filed by Discover Bank, Discover Financial Services, Inc. * * * (Celeste, John) (Entered: 01/27/2004)
01/29/2004	31	Supplemental Correspondence re: Proposed Order for Defendant's Motion to Dismiss (Attachments: # 1 Text

		of Proposed Order Proposed Order for Defendant's Motion to Dismiss)(Mattingly, John) (Entered: 01/29/2004)
02/03/2004	32	Consent REQUEST for Extension of Time to File *Responsive Pleadings to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment* (Attachments: # 1 Text of Proposed Order Order extending response deadline)(Mattingly, John) (Entered: 02/03/2004)
02/03/2004	33	ORDER DIRECTING Defendant's responsive pleadings shall be filed on or before 2/17/04. Signed by Judge William D Quarles Jr. on 2/3/04. (jlb, Deputy Clerk) (Entered: 02/03/2004)
02/04/2004	34	PAPERLESS ORDER Counsel for Discover Financial Services, Inc. and Discover Bank have e-filed document number 30 which, with attachments, exceeds 15 pages in length. Counsel have not submitted a paper copy of that document as required by the court's CM/ECF instructions. Counsel are directed to do so immediately

		by mailing or hand-delivering to chambers a paper copy of the document, together with a notice that the document has been e-filed. Signed by Judge William D Quarles Jr. on 2/4/2004. (kab, Chambers) (Entered: 02/04/2004)
02/04/2004	35	Correcting Earlier Submission (Celeste, John) (Entered: 02/04/2004)
02/17/2004	36	MOTION to Strike 30 Reply to Response to Motion, *Motion to Strike Plaintiffs' Affidavits and Exhibits in Opposition to Defendant's First Motion for Summary Judgment* by Betty E. Vaden. Responses due by 3/5/2004 * * * (Mattingly, John) (Entered: 02/17/2004)
02/17/2004	37	REPLY to Response to Motion re 21 MOTION for Summary Judgment *Reply Memorandum of law in Support of Defendant's First Motion for Summary Judgment* filed by Betty E. Vaden. * * * (Mattingly, John) (Entered: 02/17/2004)
02/17/2004	38	Correspondence re: Copies for Judge Quarles, Notices of

		lengthy Exhibits & Certificates of Service (Mattingly, John) (Entered: 02/17/2004)
03/05/2004	39	RESPONSE re 36 MOTION to Strike 30 Reply to Response to Motion, *Motion to Strike Plaintiffs' Affidavits and Exhibits in Opposition to Defendant's First Motion for Summary Judgment* filed by Discover Bank, Discover Financial Services, Inc. (Wagman, Matthew) (Entered: 03/05/2004)
03/05/2004	40	Correspondence re: Discover Bank's and Discover Financial Services, Inc.'s Opposition to Defendant's Motion to Strike Affidavits and Exhibits in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment (Wagman, Matthew) (Entered: 03/05/2004)
03/19/2004	41	REPLY to Response to Motion re 36 MOTION to Strike 30 Reply to Response to Motion, *Motion to Strike Plaintiffs' Affidavits and Exhibits in Opposition to Defendant's First Motion for Summary Judgment Reply Memorandum* filed by Betty

		E. Vaden. * * * (Mattingly, John) (Entered: 03/19/2004)
03/19/2004	42	Correspondence re: Judge's Copy of Reply Memorandum and Proposed Order (Mattingly, John) (Entered: 03/19/2004)
03/19/2004	43	Correspondence re: Proposed Order for Defendant's Motion to Strike Affidavits and Exhibits in support of Plaintiffs' Opposition to Defendant's First Motion for Summary Judgment (Mattingly, John) (Entered: 03/19/2004)
04/07/2004	44	Joint Correspondence re: Status Conference (Wagman, Matthew) (Entered: 04/07/2004)
04/07/2004	45	Paperless ORDER granting parties request to schedule a status conference after the Court rules on the motions rather than in advance of those rulings. 44 Miscellaneous Correspondence. Signed by Judge William D Quarles Jr. on April 7,2004. (Quarles, William) (Entered: 04/07/2004)
06/21/2004	46	MEMORANDUM OPINION AND ORDER. Signed by

		Judge William D Quarles Jr. on 6/21/04. (jnl, Deputy Clerk) (Entered: 06/21/2004)
06/21/2004	47	ORDER granting in part and denying in part plaintiffs' motion to compel arbitration and enjoin the defendant from prosecuting counterclaims in state court, staying defendant's prosecution of counterclaims in status [sic] court, denying 14 Motion of defendant to Dismiss plaintiff Discover Bank, denying 21 Motion of defendant for Summary Judgment, denying 36 Motion to Strike Exhibits; directing this case be closed. Signed by Judge William D Quarles Jr. on 6/21/04. (jnl, Deputy Clerk) (Entered: 06/21/2004)
07/07/2004	48	NOTICE OF APPEAL as to 46 Memorandum Opinion, 47 Order on Motion to Dismiss/Lack of Jurisdiction, Order on Motion for Summary Judgment, Order on Motion to Strike, by Betty E. Vaden. Filing fee $ 255. Appeal Record due by 8/6/2004. (Mattingly, John) (Entered:

		07/07/2004)
07/07/2004	49	Correspondence re: filing and docketing fee and original notice of appeal enclosed (Mattingly, John) (Entered: 07/07/2004)
07/08/2004	50	Correspondence re: Certificate pursuant to FRAP 10(b)(1)(B), no transcript ordered (Mattingly, John) (Entered: 07/08/2004)
07/09/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 48 Notice of Appeal, (sls, Deputy Clerk) (Entered: 07/09/2004)
07/13/2004		USCA Appeal Fees received $ 255 receipt number 1205309 re 48 Notice of Appeal, filed by Betty E. Vaden (das, Deputy Clerk) (Entered: 07/13/2004)
07/16/2004		USCA Case Number 04-1848 for 48 Notice of Appeal, filed by Betty E. Vaden. (Case Manager - Sue Ellen Nagle) (sls, Deputy Clerk) (Entered: 07/16/2004)
07/19/2004	51	Certificate of Clerk certifying the record is complete for appeal purposes re: 48 Notice of Appeal (sls, Deputy

		Clerk) (Entered: 07/19/2004)
01/25/2005	52	JUDGMENT of USCA (certified copy) "VACATING" and "REMANDING" to the District Court further proceeding consistent with the Court's opinion as to 48 Notice of Appeal, filed by Betty E. Vaden, (sls, Deputy Clerk) (Entered: 01/25/2005)
02/15/2005	54	Status Report Submitted by Discover Bank, Discover Financial Services, Inc. (Wagman, Matthew) (Entered: 02/15/2005)
02/16/2005	55	MANDATE of USCA as to 48 Notice of Appeal, filed by Betty E. Vaden, (Attachments: # 1 Certified Judgment)(bmh, Deputy Clerk) (Entered: 02/18/2005)
02/24/2005		Telephone Conference held on 2/24/2005 before Judge William D Quarles Jr. (jlb, Deputy Clerk) (Entered: 02/25/2005)
02/25/2005	56	ORDER CONFIRMING Schedule set during telephone conference. Signed by Judge William D Quarles Jr. on 2/25/05. (jlb, Deputy Clerk) (Entered: 02/25/2005)
04/01/2005	57	Status Report Submitted *Re:*

		Briefing by Discover Bank, Discover Financial Services, Inc. (Wagman, Matthew) (Entered: 04/01/2005)
04/01/2005	58	Supplemental Brief Regarding the Parties' Arbitration Agreement and in Further Support of Petition to Compel Arbitration by Discover Bank, Discover Financial Services, Inc. Responses due by 4/18/2005 (Attachments: # 1 Affidavit Julie Loeger)(Wagman, Matthew) Modified on 4/1/2005 (jlb, Deputy Clerk). (Entered: 04/01/2005)
04/01/2005	59	MOTION to Dismiss for Lack of Jurisdiction by Betty E. Vaden. Responses due by 4/18/2005 (Attachments: #1 Memorandum of Law in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction * * *) (Mattingly, John) (Entered: 04/01/2005)
04/01/2005	60	Request for Hearing re 59 MOTION to Dismiss for Lack of Jurisdiction. (Mattingly, John) (Entered: 04/01/2005)
04/01/2005	61	Correspondence re: Copy for

		Judge Quarles of Motion and Memorandum with Exhibits (Mattingly, John) (Entered: 04/01/2005)
04/12/2005	62	Supplemental to *Brief in Opposition to Plaintiffs' Verified Complaint in the Nature of a Petition to Compel Arbitration.* * * * (Mattingly, John) (Entered: 04/12/2005)
04/12/2005	63	Correspondence re: Copy of Brief for Judge Quarles (Mattingly, John) (Entered: 04/12/2005)
04/12/2005	64	Request for Hearing. (Mattingly, John) (Entered: 04/12/2005)
04/18/2005	65	Correspondence re: Discover Bank's and Discover Financial Services, Inc.'s Opposition to Defendant's Motion to Dismiss Challenging Federal Subject Matter Jurisdiction (Wagman, Matthew) (Entered: 04/18/2005)
04/18/2005	66	RESPONSE in Opposition re 59 MOTION to Dismiss for Lack of Jurisdiction filed by Discover Bank, Discover Financial Services, Inc. Replies due by 5/2/2005. * * * (Wagman, Matthew) (En-

		tered: 04/18/2005)
04/26/2005	67	REPLY to Response to Motion re 58 Supplemental MOTION for Summary Judgment *Regarding the Parties' Arbitration Agreement and in Further Support of Petition to Compel Arbitration* filed by Discover Bank, Discover Financial Services, Inc. (Wagman, Matthew) (Entered: 04/26/2005)
04/26/2005	68	Correspondence re: Reply to Defendant[']s Opposition to Plaintiffs['] Supplemental Brief on the Existence of the Parties Arbitration Agreement and in Further Support of Petition to Compel Arbitration (Wagman, Matthew) (Entered: 04/26/2005)
05/02/2005	69	REPLY to Response to Motion re 59 MOTION to Dismiss for Lack of Jurisdiction filed by Betty E. Vaden. * * * (Mattingly, John) (Entered: 05/02/2005)
05/02/2005	70	Correspondence re: Copy of Reply for Judge Quarles Enclosed (Mattingly, John) (Entered: 05/02/2005)
05/12/2005	71	Substantive legal issues -

		addressing (Wagman, Matthew) (Entered: 05/12/2005)
01/18/2006	72	MEMORANDUM OPINION. Signed by Judge William D Quarles Jr. on 1/18/06. (jlb, Deputy Clerk) (Entered: 01/18/2006)
01/18/2006	73	ORDER Denying 59 Motion of Defendant to Dismiss; Granting Plaintiffs' Motion to Compel Arbitration; Staying Defendant's Prosecution of her Counterclaims in State Court Pending the Outcome of Arbitration and DIRECTING this Case be Closed. Signed by Judge William D Quarles Jr. on 1/18/06. (jlb, Deputy Clerk) (Entered: 01/18/2006)
02/09/2006	74	NOTICE OF APPEAL by Betty E. Vaden. Filing fee $ 255. Appeal Record due by 3/13/2006. (Mattingly, John) (Entered: 02/09/2006)
02/09/2006	75	Correspondence re: filing fee & original notice of appeal enclosed (Mattingly, John) (Entered: 02/09/2006)
02/09/2006	76	NOTICE by Betty E. Vaden *certificate pursuant to FRAP 10(b)(1)(B) no transcript to be ordered* (Mattingly, John)

		(Entered: 02/09/2006)
02/13/2006		USCA Appeal Fees received $ 255 receipt number 14637007292 re 74 Notice of Appeal filed by Betty E. Vaden, (bmh, Deputy Clerk) (Entered: 02/15/2006)
02/15/2006	77	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 74 Notice of Appeal. * * * (bmh, Deputy Clerk) (Entered: 02/15/2006)
02/27/2006		USCA Case Number 06-1221 for 74 Notice of Appeal filed by Betty E. Vaden,. Case Manager - Merlene Smith-Taylor (bmh, Deputy Clerk) (Entered: 02/27/2006)
03/07/2006	78	Certificate of Clerk certifying the record is complete for appeal purposes re: 74 Notice of Appeal (sls, Deputy Clerk) (Entered: 03/07/2006)
06/15/2007	79	JUDGMENT of USCA "Affirming" the judgment of the District Court (certified copy) as to 74 Notice of Appeal filed by Betty E. Vaden (Attachments: # 1)(nrm, Deputy Clerk) (Entered: 06/15/2007)
07/10/2007	80	ORDER of USCA "Denying"

		appellant's petition for rehearing and rehearing en banc as to 74 Notice of Appeal filed by Betty E. Vaden (nrm, Deputy Clerk) (Entered: 07/10/2007)
07/20/2007	81	ORDER of USCA "Awarding" appellee $296.00 in costs as to 74 Notice of Appeal filed by Betty E. Vaden (nrm, Deputy Clerk) (Entered: 07/20/2007)
07/20/2007	82	MANDATE of USCA as to 74 Notice of Appeal filed by Betty E. Vaden (nrm, Deputy Clerk) (Entered: 07/20/2007)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

DISCOVER BANK *
12 Read's Way
New Castle, Delaware 19720 *

and *

DISCOVER FINANCIAL *
SERVICES, INC.,
2500 Lake Cook Road *
Riverwoods, Illinois 60015
*

Plaintiffs,
*

v. Civil Action No.___
*

BETTY E. VADEN
4113 Kathland Ave. *
Baltimore, MD 21207
*

Defendant.
*

* * * * * * * * *

VERIFIED COMPLAINT IN THE NATURE OF A PETITION TO COMPEL ARBITRATION AND ENJOIN DEFENDANT'S PROSECUTION OF HER STATE COURT COUNTERCLAIM

Plaintiffs Discover Bank and Discover Financial Services, Inc. (collectively, "Discover") hereby file this Complaint in the Nature of a Petition to Compel Arbitration and Enjoin Defendant's Prosecution of Her State Court Counterclaim against Defendant Betty E. Vaden ("Ms. Vaden") pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2, 4, and respectfully allege the following:

The Parties

1. Discover Bank is a federally insured bank chartered and incorporated in the State of Delaware with its principal place of business in Delaware.

2. Discover Financial Services, Inc. is a Delaware corporation with its principal place of business in Illinois.

3. Discover Financial Services, Inc. is the servicing affiliate of Discover Bank (formerly known as Greenwood Trust Company), the issuer of the Discover Card credit card held by Defendant.

4. Ms. Vaden is an adult individual residing at 4113 Kathland Avenue, Baltimore, Maryland 21207.

Jurisdiction And Venue

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

6. Defendant filed a "Class Action Counterclaim" (the "Counterclaim") in a state court collection pro-

ceeding pending in the Circuit Court for Baltimore City that, pursuant to an arbitration provision in the parties' agreement governing their relationship, must be arbitrated. Discover seeks to compel arbitration pursuant to that agreement and the Federal Arbitration Act.

7. In Counts I-III of her Counterclaim, Defendant broadly claims that Discover charged illegal finance charges, interest and late fees under Maryland law. Specifically, in Count I, Defendant alleges that Maryland law barred Discover from charging both late fees and finance charges at the contractual periodic rate set forth in the parties' cardmember agreement. In Count II, Defendant alleges that Discover violated Maryland law by compounding interest. In Count III, Defendant alleges that Discover violated Maryland law by charging an increased interest rate on outstanding balances. These counts of Defendant's counterclaims are completely preempted by Section 27(a) of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d(a).

8. Accordingly, resolution of Defendant's claims that Discover Bank charged illegal finance charges, interest and late fees involve questions of federal law under 28 U.S.C. § 1331. This Court may exercise supplemental jurisdiction under 28 U.S.C. § 1367 with respect to any of Defendant's claims not preempted by federal law.

9. Venue is proper in this District under 28 U.S.C. § 1391(b) as Defendant resides in this District.

Facts

10. As part of the regular course of its business, Discover maintains records of the accounts of those individuals who have a Discover Card credit card account ("Cardmembers"). The terms and conditions that govern the relationship between Discover and its Cardmembers are set forth in a written agreement (the "Cardmember Agreement").

11. According to Discover's records, in or about October 1990, Discover opened an account for Ms. Vaden in response to Ms. Vaden's application for a Discover credit card. Discover then issued and mailed Ms. Vaden a Discover Card along with a Fulfillment Kit that included a copy of the Cardmember Agreement.

12. Since that time, Ms. Vaden and Discover have been parties to the Discover Cardmember Agreement, which sets forth the terms and conditions governing the relationship between Discover and each cardmember. A true and correct copy of the version of the Cardmember Agreement that was in effect when Ms. Vaden opened her account in 1990 is attached hereto as Exhibit A. The Cardmember Agreement provided, among other things, as follows:

> "**ACCEPTANCE OF AGREEMENT.** The use of your Account or the Card by you or anyone whom you authorize or permit to use the Account or the Card means you accept this Agreement."

13. Ms. Vaden accepted the Cardmember Agreement by not rejecting it in accordance with its terms and by using the Card continuously from 1990 to 2001 when her privileges were suspended for non-payment. During that entire period, Ms. Vaden was an active cardmember.

14. The Cardmember Agreement further provided that it was governed by the law of the State of Delaware and applicable federal laws.

15. The Cardmember Agreement also contained a "Change of Terms" clause that permitted the amendment of the Cardmember Agreement.

16. Pursuant to the "Change of Terms" provision in the Cardmember Agreement, the Agreement has been modified from time to time between 1990 and the present.

17. A true and correct copy of the version of the Cardmember Agreement that was in effect and includes the terms applicable to Ms. Vaden's account in 1999, is attached hereto as Exhibit B. This version of the Cardmember Agreement, known internally at Discover as Terms Level 10, included a "Change of Terms" clause which provides in pertinent part:

> **CHANGE OF TERMS.** We may change any term or part of this Cardmember Agreement, including any finance charge rate, fee or method of computing any balance upon which the finance charge rate is assessed, or add any new term or part to this Cardmember Agree-

> ment by sending you a written notice at least 15 days before the change is to become effective. . . . If you do not agree to the change, you must notify us in writing within 15 days after the mailing of the notice of change, in which case your Account will be closed and you must pay us the balance that you owe us under the existing terms of the unchanged Cardmember Agreement. Otherwise, you will have agreed to the changes in the notice. Use of your Account after the effective date of change will be deemed acceptance of the new terms on such effective date, even if you previously notified us that you did not agree to the change.

18. Subsequently, as authorized by the foregoing "Change of Terms" provision, and in accordance with Delaware banking law, 5 Del. C. §952, beginning in July 1999 and continuing through August 1999, a Notice of Amendment for changes known internally at Discover as "Terms Level 11" was inserted into and mailed with the billing statements of all Discover cardmembers -- including Ms. Vaden -- who had open accounts and were receiving statements. A true and correct copy of the Terms Level 11 Notice of Amendment (the "1999 Notice of Amendment") (including the arbitration agreement that is the subject of this action) is attached hereto as Exhibit C.

19. Discover's records show that on or about July 26, 1999, Discover mailed to Ms. Vaden a copy of the 1999 Notice of Amendment.

20. The 1999 Notice of Amendment, among other

things, added an arbitration agreement to the Cardmember Agreement. The 1999 Notice of Amendment stated:

> **"NOTICE OF AMENDMENT TO DISCOVER CARDMEMBER AGREEMENT:** This notice informs you of changes to your current Discover Cardmember Agreement. Please note the effective date of the changes shown below and retain this notice for your records - WE ARE ADDING A NEW ARBITRATION SECTION WHICH PROVIDES THAT IN THE EVENT YOU OR WE ELECT TO RESOLVE ANY CLAIM OR DISPUTE BETWEEN US BY ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. THIS ARBITRATION SECTION WILL NOT APPLY TO LAWSUITS FILED BEFORE THE EFFECTIVE DATE."

21. The 1999 Notice of Amendment set forth the arbitration agreement that was being added to the Cardmember Agreement. That arbitration agreement provides, in relevant part, that the parties each have the option of requiring the arbitration of any claims brought by the other party in court:

> **"ARBITRATION. WE ARE ADDING A NEW SECTION TO READ AS FOLLOWS: ARBITRATION OF DISPUTES.** In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute,

common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.

IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY."

Your Account involves interstate commerce, and this provision shall be governed by the Federal Arbitration Act (FAA) . . . .

22. Even if the parties opt to litigate a claim in court, the arbitration agreement provides that the parties may elect to arbitrate any new claims: "Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit, and nothing undertaken therein shall

constitute a waiver of any rights under this arbitration provision."

23. The arbitration agreement also provides for a choice of arbitration administrators: "The arbitration shall be conducted, at the option of whoever files the arbitration claim, by either JAMS/Endispute (JAMS) or the National Arbitration Forum (NAF) in accordance with their procedures in effect when the claim is filed. . . The arbitrator shall follow applicable substantive law to the extent consistent with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized at law."

24. The arbitration agreement provides for the advancement of fees to any plaintiff and caps those fees at the level of "court costs" if the action had been filed in court: "At your written request, we will advance any arbitration filing, administrative and hearing fees which you would be required to pay to pursue a claim or dispute as a result of our electing to arbitrate that claim or dispute. The arbitrator will decide who will ultimately be responsible for paying those fees. In no event will you be required to reimburse us for any arbitration filing, administrative, or hearing fees in an amount greater than what your and our combined court costs would have been if the claim had been resolved in a state court with jurisdiction." Under this provision, Discover will be obligated to pay all the fees assessed by the arbitration administrator and the arbitrator.

25. The arbitration agreement broadly applies to "our parent corporations, subsidiaries, affiliates (in-

cluding, without limitation, Discover Financial Services, Inc.), predecessors, successors, assigns, as well as the officers, directors and employees of each of these entities."

26. The 1999 Notice of Amendment concluded by reminding Cardmembers that the failure to opt out of the change in terms before it went into effect, or the use of their Discover Card after the effective date, would constitute acceptance of the change in terms as described in the 1999 Notice of Amendment, including the "Arbitration of Disputes" provision:

> **Effective Date.** If you do not agree to the changes, you must notify us in writing by September 15, 1999 . . . . If you notify us, we will close your Account and you will pay us the balance that you owe us under the current terms of the Agreement. If you do not notify us, the changes set forth in this notice will be effective and will apply to your Account for billing periods after October 1, 1999 . . . . Use of your Account after October 1, 1999, means that you accept the new terms, even if you previously notified us that you did not agree to the changes.

27. Discover implemented several quality control measures to ensure that the 1999 Notice of Amendment was delivered to existing cardmembers. These measures included: (a) auditing mail files prior to printing, (b) monitoring insertion of the Notice of Amendment into monthly billing statements, (c) random audit of statements to ensure correct insertion of the Notice of Amendment into billing statements, (d)

seed mailing to various Discover employees to validate insertion and receipt, and (e) reconciliation of notification against a list of eligible cardmembers to ensure that every cardmember appeared in at least one form of mailing at the completion of the process.

28. At no time has Discover ever received from Ms. Vaden any notification – written or otherwise – that she did not agree with or wished to opt-out of the change of terms contained in the 1999 Notice of Amendment, which included the arbitration agreement. Moreover, Ms. Vaden continued to use her Discover Card to make purchases after October 1, 1999, when the arbitration agreement became effective. True and correct copies of periodic statements reflecting the purchases made by Ms. Vaden after October 1, 1999 are attached hereto as Exhibit D.

29. The Cardmember Agreement has been amended since 1999. There were no changes made to the arbitration agreement prior to the charge-off of Ms. Vaden's account.

30. On or about June 23, 2003, Discover instituted suit against Ms. Vaden in the District Court of Maryland for Baltimore City. Discover sought repayment of $10,610.74 which was past due on Ms. Vaden's credit card account.

31. As Ms. Vaden requested a jury trial, the matter was removed to the Circuit Court for Baltimore City, Maryland.

32. On or about October 20, 2003, Ms. Vaden filed her Counterclaim against Discover. A true and correct copy of the Counterclaim is attached hereto as Exhibit E. The first three counts of the Counterclaim concern the finance charges, interest and late fees charged by Discover in alleged violation of Md. Code Ann., Com. Law II §§ 12-506(a)(6), 12-506(a)(5) and 12-506.2. Ms. Vaden alleges that Discover violated those statutes as follows:

a. Discover "illegally assessed both finance charges and late fees, concurrently, against the open end accounts of Vaden and the putative Class Members" and "pursuant to Md. Code Ann., Comm. Law II § 12-506(a)(6)," Discover "could only assess either a finance charge or a late fee, but not both against its customers." Counterclaim at ¶¶ 43-44.
b. Discover "illegally charged compound interest and compound finance charges against the open end accounts of Vaden and the putative Class Members" and "pursuant to Md. Code Ann., Com. Law II § 12-506(a)(5)," Discover "could not charge compound interest charges against its customers." Counterclaim at ¶¶ 48-49.
c. Discover "increased the existing interest rates assessed to the open end accounts of its customers" and "pursuant to Md. Code Ann., Com. Law II § 12-506.2" Discover "could not apply the newly increased interest rate to the pre-existing account balances of its customers." Counterclaim at ¶¶ 53, 55.

33. All of the allegations, claims and causes of action alleged by Ms. Vaden in the Counterclaim are within the scope of the parties' broad arbitration agreement and are subject to arbitration.

Relief

34. The arbitration agreement contained in the Cardmember Agreement provides for the arbitration of "any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, [or] the relationships which result from your Account." All of Defendant's claims clearly arise "from or relate to" her Account or "the relationships which result from your Account." By its express terms, claims against Discover Financial Services, Inc. also are within the scope of the arbitration agreement.

35. By this action, Discover seeks to require Ms. Vaden's compliance with the arbitration agreement in the Cardmember Agreement and to enjoin her further prosecution of the Counterclaim in state court.

36. The parties' arbitration agreement precludes Defendant from bringing any class action. Nevertheless, Defendant purports to assert her claims on behalf of a class of similarly situated persons.

37. Accordingly, there are disputes between the parties and arbitrable matters arising out of and relating to the provisions of the Cardmember Agree-

ment which are properly subject to binding arbitration.

WHEREFORE, Plaintiffs pray that an order be made and entered herein directing that arbitration between Defendant and Plaintiffs proceed in the manner provided for in the arbitration agreement; that the issues raised in Defendant's Counterclaim be determined by binding arbitration in accordance with the parties' arbitration agreement; that Defendant's claims proceed on an individual basis in arbitration; that Defendant be restrained from taking any further action to prosecute her Counterclaim while the parties proceed to arbitration in accordance with the parties' arbitration agreement; and that Plaintiffs obtain such other or further relief as the Court may deem just and proper; together with the costs and disbursements of this Complaint.

Respectfully submitted,

/s/
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VERIFICATION

I, Julie Loeger, a vice-president in the marketing department of Discover Financial Services, Inc., declare under penalty of perjury that the facts set forth in the foregoing Complaint are based upon my personal knowledge and from information contained in the records of Discover Financial Services, Inc. and Discover Bank and are true and correct. I make this declaration pursuant to the provisions of 28 U.S.C. § 1746.

Dated: November 12, 2003 _____/s/_____
Julie Loeger

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
[EXHIBIT B TO PETITION TO COMPEL]

NOTICE OF AMENDMENT TO DISCOVER® PLATINUM CARDMEMBER AGREEMENT

This notice informs you of changes to your current Discover® Platinum Cardmember Agreement. Please note the effective date of the changes shown below and retain this notice for your records. **WE ARE ADDING A NEW ARBITRATION SECTION WHICH PROVIDES THAT IN THE EVENT YOU OR WE ELECT TO RESOLVE ANY CLAIM OR DISPUTE BETWEEN US BY ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. THIS ARBITRATION SECTION WILL NOT APPLY TO LAWSUITS FILED BEFORE THE EFFECTIVE DATE.** We are also changing the way we calculate Periodic Finance Charges. These changes do not apply if your Account is closed at the time you receive this notice.

* * * * *

ARBITRATION. WE ARE ADDING A NEW SECTION TO READ AS FOLLOWS:

ARBITRATION OF DISPUTES. In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to

your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.

IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit, and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision.

We will not invoke our right to arbitrate an individual claim you bring in small claims court or your state's equivalent court, if any, so long as the claim is pending only in that court and does not exceed $5,000.

Your Account involves interstate commerce, and this provision shall be governed by the Federal Arbitration

Act (FAA). The arbitration shall be conducted, at the option of whoever files the arbitration claim, by either JAMS/Endispute (JAMS) or the National Arbitration Forum (NAF) in accordance with their procedures in effect when the claim is filed. For a copy of their procedures, to file a claim or for other information, contact JAMS at 1920 Main Street, Suite 300, Los Angeles, CA 92614 (phone 1-800-448-1660) or NAF at P.O. Box 50191, Minneapolis, MN 55405 (phone 1-800-474-2371). At your written request, we will advance any arbitration filing, administrative and hearing fees which you would be required to pay to pursue a claim or dispute as a result of our electing to arbitrate that claim or dispute. The arbitrator will decide who will ultimately be responsible for paying those fees. In no event will you be required to reimburse us for any arbitration filing, administrative, or hearing fees in an amount greater than what your and our combined court costs would have been if the claim had been resolved in a state court with jurisdiction.

Any arbitration hearing will take place in the federal judicial district where you reside. The arbitrator shall follow applicable substantive law to the extent consistent with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized at law. If requested by any party, the arbitrator shall write an opinion containing the reasons for the award. The arbitrator's decision will be final and binding except for any appeal rights under the FAA and except that if the amount in controversy exceeds $100,000, any party may appeal the award within 30 days to a three-arbitrator panel which shall review the award *de novo*. The costs of such an appeal shall be borne by

the appealing party regardless of outcome. Judgment upon any award by the arbitrator may be enforced in any court having jurisdiction.

Our rights and obligations under this arbitration provision shall inure to the benefit of and be binding upon our parent corporations, subsidiaries, affiliates (including, without limitation, Discover Financial Services, Inc.), predecessors, successors, assigns, as well as the officers, directors and employees of each of these entities, and will also inure to the benefit of any third party named as a co-defendant with us or with any of the foregoing in a claim which is subject to this arbitration provision. Your rights and obligations under this arbitration provision shall inure to the benefit of and be binding upon all persons contractually liable under this Agreement and all Authorized Users of the Account. This arbitration provision shall survive termination of your Account as well as voluntary payment in full by you, any legal proceedings by us to collect a debt owed by you, any bankruptcy by you and any sale by us of your Account.

Effective Date. If you do not agree to the changes, you must notify us in writing by *September 15, 1999*, at the following address: Discover Card, P.O. Box 15355, Wilmington, DE 19850-5355. If you notify us, we will close your Account and you will pay us the balance that you owe us under the current terms of the Agreement. If you do not notify us, the changes set forth in this notice will be effective and will apply to your Account for billing periods beginning after *September 1, 1999*. Use of your Account on or after October 1, 1999, means that you accept the new terms,

even if you previously notified us that you did not agree to the changes.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

DISCOVER BANK, et al.	)	
	)	
Plaintiffs	)	
	)	**Case No.:**
	)	**1:03-cv-3224-WDQ**
vs.	)	
	)	
BETTY E. VADEN	)	
	)	
Defendant	)	

ANSWER

COMES NOW the Defendant, Betty E. Vaden, by and through her counsel, John A. Mattingly, Jr. and Baldwin, Briscoe & Mattingly, Chtd., and respectfully states as follows for her Answer to the Complaint served upon her in this action:

1. Defendant admits that Discover Bank is a federally insured bank chartered and incorporated in the State of Delaware. Defendant lacks sufficient knowledge to determine the accuracy of the allegation concerning the location of Discover Bank's principal place of business.

2. Defendant admits the allegations in Paragraph 2 of the Complaint.

3. Defendant denies the allegations contained in Paragraph 3 of the Complaint.

4. Defendant admits the allegations in Paragraph 4 of the Complaint.

5. Defendant denies the allegations contained in Paragraph 5 of the Complaint.

6. Defendant denies the allegations contained in Paragraph 6 of the Complaint.

7. Defendant denies the allegations contained in Paragraph 7 of the Complaint.

8. Defendant denies the allegations contained in Paragraph 8 of the Complaint.

9. Defendant admits the allegations contained in Paragraph 9 of the Complaint.

10. Defendant denies the allegations contained in Paragraph 10 of the Complaint.

11. Defendant admits the allegations of Paragraph 11 to the extent that Co-Plaintiff Discover Financial Services, Inc. opened an account, then issued and mailed a Discover Card to the Defendant. Defendant denies the remaining allegations contained in Paragraph 11 of the Complaint, and further denies any of

the allegations contained Paragraph 11 as they relate to or refer to Co-Plaintiff Discover Bank or Co-Plaintiff Discover Bank's involvement therein.

12. Defendant denies the allegations contained in Paragraph 12 of the Complaint.

13. Defendant denies the allegations contained in Paragraph 13 of the Complaint.

14. Defendant denies any and all allegations that the Exhibit attached to the Complaint purporting to be the "Cardmember Agreement" represents an agreement with the Defendant. Accordingly, Defendant denies the allegations contained in Paragraph 14 of the Complaint.

15. Defendant denies any and all allegations that the Exhibit attached to the Complaint purporting to be the "Cardmember Agreement" represents an agreement with the Defendant. Accordingly, Defendant denies the allegations contained in Paragraph 15 of the Complaint.

16. Defendant denies the allegations contained in Paragraph 16 of the Complaint.

17. Defendant denies the allegations contained in Paragraph 17 of the Complaint.

18. Defendant denies the allegations contained in Paragraph 18 of the Complaint.

19. Defendant denies the allegations contained in Paragraph 19 of the Complaint.

20. Defendant denies the allegations contained in Paragraph 20 of the Complaint.

21. Defendant denies the allegations contained in Paragraph 21 of the Complaint.

22. Defendant denies the allegations contained in Paragraph 22 of the Complaint.

23. Defendant denies any and all allegations as to the existence of an "arbitration agreement." Accordingly, Defendant denies the allegations contained in Paragraph 23 of the Complaint.

24. Defendant denies the allegations contained in Paragraph 24 of the Complaint.

25. Defendant denies the allegations contained in Paragraph 25 of the Complaint.

26. Defendant denies the allegations contained in Paragraph 26 of the Complaint.

27. Defendant denies the allegations contained in Paragraph 27 of the Complaint.

28. Defendant denies the allegations contained in Paragraph 28 of the Complaint.

29. Defendant lacks sufficient knowledge to determine the accuracy of the allegation concerning

whether any amendments Co-Plaintiff Discover Financial Services, Inc. may have been made since the "charge-off" of the Defendant's account with Co-Plaintiff Discover Financial Services, Inc. Defendant denies the remaining allegations contained in Paragraph 29 of the Complaint.

30. Defendant admits the allegations of Paragraph 30 to the extent that Co-Plaintiff Discover Financial Services, Inc. instituted suit. Defendant denies the remaining allegations contained in Paragraph 30 of the Complaint, and further denies any of the allegations contained [in] [sic] Paragraph 30 as they relate to or refer to Co-Plaintiff Discover Bank or Co-Plaintiff Discover Bank's involvement therein.

31. Defendant admits the allegations contained in Paragraph 31 of the Complaint.

32. Defendant admits the allegations contained in Paragraph 32 to the extent that counterclaims were filed against Discover Financial Services, Inc. for Discover Financial Services, Inc.'s violations. Defendant denies the remaining allegations contained in Paragraph 32 of the Complaint as they relate to or refer to Co-Plaintiff Discover Bank or Co-Plaintiff Discover Bank's involvement therein.

33. Defendant denies the allegations contained in Paragraph 33 of the Complaint.

34. Defendant denies the allegations contained in Paragraph 34 of the Complaint.

35. Defendant denies [the] [sic] allegation of the existence of an arbitration agreement in Paragraph 35 of the Complaint. Defendant further denies that the Plaintiffs are entitled to the requested relief[.]

36. Defendant denies the allegation of the existence of an arbitration agreement and denies the allegation in Paragraph 36 of the Complaint as to the existence of an arbitration agreement which would preclude the Defendant from bringing any class action.

37. Defendant denies the allegations contained in Paragraph 37 of the Complaint.

38. In response to the unnumbered paragraph seeking relief, Defendant denies that Plaintiffs are entitled to the relief set forth in this paragraph. Defendant further denies that the Plaintiffs are entitled to any relief whatsoever.

Additional Defenses

1. The Complaint fails to state a claim upon which relief can be granted.

2. Plaintiffs have failed to satisfy the requirements of 9 U.S.C. §4.

3. Plaintiffs have failed to fulfill the conditions precedent to filing suit under 9 U.S.C. §4.

4. Plaintiff or Plaintiffs lack standing.

5. Waiver.

6. Laches.

7. Illegality.

8. Duress.

9. Estoppel.

10. Failure of Consideration.

11. Release.

12. Statute of Limitations.

13. Statute of Frauds.

14. Res Judicata.

15. Defensive use of issue preclusion.

16. Rescission.

17. Lack of Privity.

18. Failure of a Plaintiff or Plaintiffs to be an aggrieved party.

19. Failure to notify.

20. Defendant is not in default.

21. Lack of Subject Matter Jurisdiction.

22. Equitable Estoppel.

23. Judicial Estoppel.

24. Fraud.

25. An arbitration agreement does not exist with either Plaintiff.

26. The underlying dispute is not arbitrable.

27. Arbitration cannot provide for the requested relief in the underlying action.

28. Purported arbitration agreement is illusory.

29. Defendant is not a signatory to the purported arbitration agreement.

30. The purported arbitration agreement is unconscionable, both substantively and procedurally.

31. Any purported arbitration provision is unenforceable as the alleged contract containing the purported arbitration agreement is void *ab initio* as illegal and against public policy under applicable state law.

32. Any other matter which constitutes avoidance or affirmative defenses under the Federal Arbitration Act.

33. Defendant reserves the right to amend her Answer and to rely upon such defenses as may become applicable up to and including the time of trial.

Specific Negative Averments

1. Plaintiff Discover Bank lacks capacity to bring suit against the Defendant.

Denial of Conditions Precedent

1. Plaintiff or Plaintiffs have failed to perform the conditions precedent to bringing suit against the Defendant pursuant to 9 U.S.C. §4. Moreover, the conditions precedent to filing suit against the Defendant have not occurred.

2. Failure of a Plaintiff or Plaintiffs to be an aggrieved party.

3. Failure to follow the pre-filing notification procedures pursuant to 9 U.S.C. §4.

4. Defendant is not in default.

5. There is no controversy between Defendant and a Plaintiff or Plaintiffs.

WHEREFORE, Defendant Betty E. Vaden respectfully moves this Honorable Court to dismiss the Complaint with prejudice, enter final judgment against the Plaintiffs in favor of the Defendant, and award the Defendant her costs and attorney's fees.

DATED: December 4th, 2003

Respectfully submitted,

/s/

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U.S. District Court Bar Number 14202

Counsel for the Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

DISCOVER BANK, et al.	)	
	)	
Plaintiffs	)	
	)	**Case No.:**
	)	**1:03-cv-3224-WDQ**
vs.	)	
	)	
BETTY E. VADEN	)	
	)	
Defendant	)	

AFFIDAVIT

I, **Betty E. Vaden**, on oath, states as follows:

1. That, I have or had an account with Discover Financial Services, Inc.

2. That, at no time did I enter into an arbitration agreement with Discover Financial Services, Inc. or Discover Bank.

3. That, I did not receive any "Notice of Amendment" from Discover Financial Services, Inc. or Discover Bank.

4. That, the purported "NOTICE OF AMENDMENT TO DISCOVER PLATINUM CARDMEMBER AGREEMENT" could not have been sent to me "on or about July 26, 1999" because I did not even have a Discover Platinum Card at that time.

5. That, I did not become a Discover Platinum Cardholder until September of 1999.

I declare under the penalties of perjury that the foregoing is true and correct. Executed on this 12/29/03 day of December, 2003.

_____/s/_____
BETTY E. VADEN

PETITIONER'S BRIEF

94

(5)

No. 07-773

FILED
JUN 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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64733 B E3P

QUESTIONS PRESENTED

1. Whether a suit seeking to enforce a state-law arbitration obligation brought under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, "aris[es] under" federal law, see 28 U.S.C. § 1331, when the petition to compel itself raises no federal question but the dispute sought to be arbitrated—a dispute that the federal court is not asked to and cannot reach—involves federal law.

2. If so, whether a "completely preempted" state-law *counter*claim in an underlying state-court dispute can supply subject matter jurisdiction.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Fourth Circuit (Pet. App. 1a-39a) are reported at 489 F.3d 594. The initial opinion of the Fourth Circuit (Pet. App. 57a-74a) is reported at 396 F.3d 366. The opinion (Pet. App. 40a-54a) and order (Pet. App. 55a-56a) of the district court are reported at 409 F. Supp. 2d 632. The earlier opinion (Pet. App. 75a-88a) and order (Pet. App. 89a-90a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2007. The court of appeals denied a timely petition for rehearing and rehearing en banc on July 20, 2007 (Pet. App. 91a-92a). On September 24, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 7, 2007 and the petition was filed on that date. This Court granted the petition on March 17, 2008. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

Chapters 1 and 2 of Title 9 of the United States Code are set out in full as appendices to this brief.

STATEMENT

This case asks whether Section 1331 permits a district court to look through a petition to compel arbitration, see 9 U.S.C. § 4, that itself raises no federal question to ground jurisdiction on the underlying dispute to be arbitrated and, if so, whether a "completely preempted" state-law counterclaim in that dispute can supply it. The Fourth Circuit answered yes to both questions.

A. Statutory Framework

Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (FAA or Act), in 1925 "'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,' and place such agreements 'upon

the same footing as other contracts.'" *Volt Info. Scis.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (citations omitted). At the time, most American courts "refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 220 n.6 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924)). This "ouster" doctrine manifested itself in three different, but overlapping, ways: some courts held such agreements invalid on public policy grounds, *e.g.*, *Wood* v. *Humphrey*, 114 Mass. 185, 186 (1873) ("[A]greements to arbitrate which entirely oust the courts of jurisdiction will not be supported at law or equity."); others held that they could be revoked any time before an arbitration award, *e.g.*, *N.P. Sloan Co.* v. *Standard Chem. & Oil Co.*, 256 F. 451, 454-455 (5th Cir. 1918); and still others held them unenforceable in equity by specific performance, but allowed damages at law for breach, *e.g.*, *Rison* v. *Moon*, 22 S.E. 165, 167 (Va. 1895).

Section 2, the Act's "centerpiece provision," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), makes written arbitration agreements "in any maritime transaction or a contract evidencing a transaction involving commerce * * * valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. Its "saving clause" was meant "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp.* v. *Flood & Conklin Mfg.*, 388 U.S. 395, 404 n.12 (1967).

The FAA provides two different enforcement mechanisms. When a federal district court already has jurisdiction over a suit containing issues referable to arbitration, Section 3 directs it, on application of a party "not in default in proceeding with * * * arbitration," 9 U.S.C. § 3, to stay determination of those issues. When no such suit is pending in district court, Section 4 allows

> [a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. District courts must treat Section 4 petitions as motions, 9 U.S.C. § 6, and hold "an expeditious and summary hearing, with only restricted inquiry into factual issues," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983), particularly whether the dispute is within a binding arbitration agreement and whether the respondent is in breach of it, see 9 U.S.C. § 4.

When neither issue is genuinely in dispute, the court orders arbitration; if either is, the court proceeds "summarily to trial," with (non-admiralty) respondents entitled to a jury. 9 U.S.C. § 4. If, after trial, the court determines that the respondent has breached an obligation to arbitrate, it orders arbitra-

tion. *Ibid.* If it does not, it dismisses the petition. *Ibid.* In any event, Section 4 does not allow the court to decide any issue in the underlying dispute or to retain jurisdiction pending completion of any arbitration. *Ibid.*; cf. 9 U.S.C. §§ 3, 8.

Other provisions of the FAA address matters that arise once parties have proceeded to arbitration. Section 7, for instance, grants federal courts the power to compel persons to testify at arbitration proceedings, while Sections 9, 10, and 11, provide, respectively, means for affirming, vacating, and modifying arbitration awards by petitioning the court in the district where the arbitration occurred. See 9 U.S.C. §§ 7, 9-11.

Congress amended Title 9 in 1970, see An Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1970, Pub. L. No. 91-368, 84 Stat. 692, to add Chapter 2, 9 U.S.C. §§ 201 *et seq.*, implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Rather than alter the FAA's original provisions (Title 9's Chapter 1), Congress added provisions specifically applicable to commercial arbitration agreements involving foreign citizens (and certain other transactions touching on foreign commerce), including two specifically addressing federal subject matter jurisdiction. One "deem[s]" all actions and proceedings relating to such agreements "to arise under the laws and treaties of the United States," 9 U.S.C. § 203; the other authorizes removal to federal district court whenever "the subject matter of an action or proceeding pending in a State court relates to an arbitration

agreement or award falling under the Convention," 9 U.S.C. § 205. Chapter 2 was intended to "leave unchanged the largely settled interpretation of the Federal Arbitration Act." H.R. Rep. No. 1181, 91st Cong., 2d Sess. 3 (1970) (letter from Acting Assistant Secretary of State H.G. Torbert, Jr.).

This Court has held that the FAA has broad substantive but no jurisdictional sweep. In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1983), for example, this Court held that the FAA "preempts a state law that withdraws the power to enforce arbitration agreements," *id.* at 16 n.10, and governs in both state and federal court, *id.* at 15-16. On the other hand, this Court has repeatedly recognized that the FAA is "something of an anomaly in the field of federal-court jurisdiction." *Hall St. Assocs.* v. *Mattel*, 128 S. Ct. 1396, 1402 (2008) (quoting *Moses H. Cone*, 460 U.S. at 25 n.32). Although the Act "creates federal substantive law requiring the parties to honor arbitration agreements," *Southland*, 465 U.S. at 15 n.9, it "bestow[s] no federal jurisdiction," *Hall St. Assocs.*, 128 S. Ct. at 1402 (citing *Moses H. Cone*, 460 U.S. at 25 n.32). "As for jurisdiction," this Court has noted, "the Act does nothing." *Ibid.*

B. Proceedings Below

In June 2003, respondent Discover Financial Services, Inc. (DFS) sued petitioner Betty Vaden in Maryland state court for failing to pay a balance allegedly owed on her credit card. Pet. App. 59a. Ms. Vaden filed class action counterclaims, alleging that DFS had breached the contract and that its "assess-

ment of finance charges, late fees, and interest rates * * * [were] in violation of Maryland law." *Id.* at 41a.

DFS and Discover Bank (together Discover) then filed a Section 4 petition in Maryland federal district court. They sought to compel arbitration of these counterclaims, citing language in a cardmember agreement to the effect that "in the event of any past, present, or future claim or dispute * * * relating to [your a]ccount * * *, you or we may elect * * * binding arbitration." *Id.* at 49a-50a. The petition did not allege that Discover had demanded arbitration or otherwise notified Ms. Vaden of its "election" or that relief was unavailable in the state court where the claims were pending. J.A. 28-43. Discover alleged federal subject matter jurisdiction under 28 U.S.C. § 1331, asserting that certain of the counterclaims were "completely preempted," J.A. 30, and that the court had supplemental jurisdiction under 28 U.S.C. § 1367 to compel arbitration of the remaining claims, *Ibid.* Discover further asked the court to enjoin Ms. Vaden from further litigating her counterclaims in state court. J.A. 41.

In response, Ms. Vaden denied she was party to an arbitration agreement. She relied on Discover's records showing that it had sent notices purporting to amend cardholder agreements to include the arbitration clause only to those holding "Platinum" accounts as of July 1999 and that her account had not been "upgraded" until later. Pet. App. 60a. The district court found that an arbitration agreement existed, directed her to arbitrate all her claims, and stayed the state court proceedings. *Id.* at 86a-87a.

The Fourth Circuit vacated and remanded. Raising the question of subject matter jurisdiction for the

first time, Pet. App. 61a, it acknowledged that a number of courts of appeals had held that Section 1331 does not confer jurisdiction unless the obligation to arbitrate itself arises under federal law, Pet. App. 62a (citing *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263 (2d Cir. 1996)), but announced that it would instead follow the Eleventh Circuit's decision in *Tamiami Partners, Ltd.* v. *Miccosukee Tribe*, 177 F.3d 1212 (11th Cir. 1999), holding "that a federal court possesses subject matter jurisdiction over a case when the controversy underlying the arbitration agreement presents a federal question," Pet. App. 63a.

The court grounded this look-through approach in three phrases in Section 4. Pet. App. 64a. First, the court read the phrase "save for such agreement" as "an instruction to set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently," *ibid.*, disagreeing with *Westmoreland* and other decisions that read this language as overriding the traditional "ouster" bar against enforcing arbitration agreements, *id.* at 65a n.2. The court then highlighted Section 4's reference to "Title 28." *Id.* at 65a-66a. That mention, it reasoned, indicated that all parts of Title 28 must give rise to jurisdiction and without "looking through," it believed, Section 1331 could not. *Ibid.* Third, the court believed the phrase "controversy between the parties" could refer only to either "the overall substantive conflict between the parties" or "the discrete dispute about whether there is a valid arbitration agreement." *Id.* at 66a. It chose the former option because, it believed, litigants "do not come to court solely to resolve the collateral issue of whether or not they have an

agreement to arbitrate," but rather "incur[] the expense and burdens of litigation * * * to resolve their real-life conflicts and move on." *Ibid.*

The court then addressed the objection that looking through the petition violates Section 1331's "well-pleaded complaint" limitation. Pet. App. 67a-70a; see *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908). Drawing an analogy to declaratory judgment actions, it dismissed this concern: "Just as the real controversy * * * [in a declaratory judgment action i]s the prospect of a [coercive] federal question suit * * *, so the real controversy * * * [here] is whether a federal action prompted the motion to compel arbitration." Pet. App. 69a.

The Fourth Circuit then remanded the case to see whether looking through could establish jurisdiction in this case. Pet. App. 72a-73a. In particular, it directed the district court to decide whether Ms. Vaden's counterclaims were "completely preempted" by federal law. *Id.* at 73a n.3. Under this doctrine, a state-law claim can ground federal question jurisdiction on removal under 28 U.S.C. § 1441(b) if federal law not only preempts the state law but also "provides the exclusive cause of action for the claim asserted." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003). When that happens, "any complaint that comes within the scope of the federal cause of action," even if it is pleaded solely in state-law terms, "necessarily 'arises under' federal law." *Id.* at 7 (quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983)). That this determination depended, in part, on whether Discover Bank, rather than DFS, the named defendant in the state court action, was "a party of interest," Pet. App. 73

n.3, compounded its complexity. The Fourth Circuit also instructed the lower court to reexamine whether Discover's financial records, viewed in the light most favorable to Ms. Vaden, raised a genuine factual dispute as to the existence of an arbitration agreement. *Id.* at 73 n.4.

On remand, the district court resolved each of these issues in Discover's favor, ruling that Discover Bank was "the real party in interest," Pet. App. 46a, that the "complete preemption doctrine * * * applie[d]," *id.* at 48a, and that no reasonable fact-finder could conclude that Ms. Vaden had not received (or accepted) the arbitration amendment, *id.* at 48a-53a. The court again ordered arbitration of all her counterclaims (both those completely preempted and those not) and enjoined her from pursuing them in state court. *Id.* at 55a.

A divided Fourth Circuit panel affirmed in all respects. Pet. App. 4a. Noting that the question was one of first impression, *id.* at 20a, the court held that federal law completely preempted Ms. Vaden's state-law counterclaims, *id.* at 25a, that Discover Bank was the "real party in interest," *id.* at 18a, and that, on a look-through theory, federal question jurisdiction was thus established. The majority rejected Ms. Vaden's contention, taken up by the dissent, that under this Court's decision in *Holmes Group* v. *Vornado Air Circulation Systems,* 535 U.S. 826, 830 (2002), a federal *counterclaim* could not furnish "arising under" jurisdiction. Pet. App. 10a n.4.

Judge Goodwin dissented, maintaining that Discover had failed to establish an independent basis for federal jurisdiction. Pet. App. 28a. Appealing to "basic" principles of federal question jurisdiction, Pet.

App. 30a, and to *Holmes Group* in particular, he concluded that a completely preempted state-law counterclaim was insufficient to establish federal question jurisdiction even under the look-through theory, *id.* at 33a-38a. The dissent also argued that looking through was itself wrong. *Id.* at 38a-39a. Agreeing with Judge Marcus's special concurrence in *Community State Bank* v. *Strong*, 485 F.3d 597 (11th Cir.), vacated, reh'g en banc granted, 508 F.3d 576 (11th Cir. Sept. 10, 2007) (No. 06-11582), which had urged reconsideration of the Eleventh Circuit's look-through rule and responded directly to the Fourth Circuit's *Vaden I* decision, Judge Goodwin concluded that "finding federal question jurisdiction where the court is asked only to enforce a private contract considerably and * * * unjustifiably[] expands federal court jurisdiction," Pet. App. 39a.

SUMMARY OF ARGUMENT

The Fourth Circuit grounded look-through jurisdiction on a fundamentally mistaken view of how Section 4 and the FAA operate: that "[l]itigants do not come to court solely to resolve the collateral issue of whether or not they have an agreement to arbitrate" but "to resolve their real-life conflicts." Pet. App. 66a. This view, of course, gets the FAA exactly backwards. It does *not* allow courts "to resolve [any] real-life conflicts." By its terms, Section 4 allows a court to decide *only* "the collateral issue" and order arbitration only if it finds one party in breach. Only when there is no agreement—and the FAA thus does not apply—can a court itself resolve the primary "real-life conflicts" between the parties.

This fundamental misunderstanding led the court to find "arising under" jurisdiction, 28 U.S.C. § 1331, when the dispute for which arbitration is sought, but not the petition to compel itself, includes a question of federal law. In so doing, the Fourth Circuit committed several fundamental errors:

First, the court's analysis focused on the wrong statute. In finding jurisdiction based on certain language in Section 4, the Fourth Circuit made little attempt to square its rule with the text of *Section 1331* or decades of case law interpreting that provision. Under those precedents, an action seeking to enforce an ordinary arbitration provision does not "aris[e] under" federal law, even if the FAA might displace an otherwise available state-law defense. Although this Court has repeatedly held that "[a]s for jurisdiction * * * the Act does nothing," *Hall St. Assocs.* v. *Mattel*, 128 S. Ct. 1396, 1402 (2008), the Fourth Circuit effectively held that Section 4 both impliedly repeals Section 1331's well-pleaded complaint rule and adopts the well-pleaded counterclaim rule this Court rejected in *Holmes Group* v. *Vornado Air Circulation Systems*, 535 U.S. 826 (2002). A jurisdictionally inert statute, however, can do no such thing.

Second, even if it did not contravene the principle that federal subject matter jurisdiction must be established independently of the FAA, the Fourth Circuit's construction of Section 4 would be untenable in its own right. In reading the provision as jurisdiction-conferring, the court of appeals took insufficient account of the history, text, structure, and purposes of Section 4, the text and structure of the surrounding provisions, and of the need to interpret the FAA as a coherent whole. In addition, the Fourth Circuit

did not attend to important historical differences between the federal and state systems that led Congress to include language in Section 4 that early adopting States had not included in their analogous statutes in order to ensure that federal courts would repudiate the "ouster doctrine," which had long barred specific performance of arbitration agreements. In fact, in cases like this one, a look-through approach frustrates, rather than advances, the FAA's central purposes—getting arbitrable disputes into arbitration as quickly as possible and having arbitrators, rather than courts, decide them.

Third, to find jurisdiction here the Fourth Circuit had to adopt a maximal version of look-through, one that aggravates its incompatibility with basic principles of federal jurisdiction. Having held (in *Vaden I*) that Section 4 allows a federal court to ignore its lack of jurisdiction over the "collateral dispute" it is asked to decide, the court's second decision held that Section 4 entitles a federal court to ignore its lack of jurisdiction over the action actually pending between the parties so long as the petitioner could point to *some* suit the controversy might raise that would *somewhere* contain a federal question. Here, it looked through the petition very far indeed, resting jurisdiction on completely preempted state-law *counter*-claims.

Fourth, the court ordered arbitration when Discover had no standing to petition for it. The alleged arbitration agreement allowed either party to *elect* arbitration; it did not require it. Thus, in filing her state-law counterclaims after Discover had brought suit against her in state court, Ms. Vaden could not have breached any arbitration obligation. Under the

agreement, such an obligation could attach only after Discover had asked Ms. Vaden to arbitrate, which it has never done. Ms. Vaden's decision to defend against Discover's Section 4 petition cannot itself constitute an injury to Discover's legal rights, when Discover has never formally asserted an election to arbitrate. Accordingly, Discover has suffered no "injury in fact" on which to assert constitutional standing.

The approach the Fourth Circuit established is extraordinary in every respect. It affirmatively directs federal courts to disregard state interests in deciding their jurisdiction and does so for no reason at all: the relief sought from the federal court here was fully and equally available in the state court where Discover brought suit. Indeed, this friction-inducing approach is not merely gratuitous, but counterproductive. A state court can make good on the core promise of the FAA—to get parties bound by an arbitration agreement into arbitration as quickly as possible. A federal court, obliged to determine its subject matter jurisdiction before reaching the merits of an arbitrability dispute, must, under the look-through rule, resolve myriad legal questions (some fact-intensive, others abstract and broadly significant) that are unrelated to the arbitrability dispute before it and that are, to the extent actually raised by the parties' substantive disagreement, committed by the FAA to arbitral resolution. This completely distorts the regime Congress intended.

ARGUMENT

I. TO CONFER JURISDICTION, SECTION 1331 REQUIRES MORE THAN THE MERE PRESENCE OF A FEDERAL ISSUE THAT IS BEYOND THE DISTRICT COURT'S AUTHORITY TO DECIDE SOMEWHERE IN THE UNDERLYING DISPUTE

Although the court of appeals recognized the need for subject matter jurisdiction, see Pet. App. 61a, neither of its decisions made any serious effort to square its exercise of jurisdiction with this Court's precedents construing 28 U.S.C. § 1331. Those cases make clear that Discover's Section 4 petition does not fall within that jurisdictional grant.

For more than a century, this Court has interpreted the "arising under" language of Section 1331 considerably more narrowly than the parallel language in Article III, compare, *e.g.*, *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152-154 (1908) with *Osborn* v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824), in order to respect Congress's role in deciding whether to confer jurisdiction. *Merrell Dow Pharm.* v. *Thompson*, 478 U.S. 804, 807-812 (1986) (lower federal courts' jurisdiction "is not self-executing"); see generally *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934) (federal courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined"). For purposes of Section 1331, an action "arises under" federal law only if it "really and substantially involves a dispute or controversy respecting the validity, construction, or effect of [federal] law, upon the determination of which

the result depends." *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912); see also *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936) ("[A] case arises 'under [federal law]'" if the plaintiff's claim "will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."). A court must determine this, moreover, by looking only to "what necessarily appears in the *plaintiff's* statement of his own claim." *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 840-841 (1989) (emphasis added) (quoting *Taylor* v. *Anderson*, 234 U.S. 74, 75-76 (1914)); *Mottley*, 211 U.S. at 152-154. These rules not only promote "clarity and ease of administration" by providing "a 'quick rule of thumb' for resolving jurisdictional conflicts," *Holmes Group*, 535 U.S. at 832, but also express "[d]ue regard for the rightful independence of state governments," *ibid.*, and "the demands of reason and coherence, and the dictates of sound judicial policy," *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959).

These precedents, which the Fourth Circuit almost completely neglected to consider, make clear that respondents' Section 4 action does not "arise under" federal law for Section 1331 purposes. This Section 4 petition does not "really and substantially involve[] a dispute or controversy respecting the validity, construction, or effect of [federal] law." Regardless of whether the issues a Section 4 petitioner hopes to arbitrate are state or federal, a Section 4 proceeding determines only if there is an arbitration agreement covered by the FAA and if the respondent party has "fail[ed], neglect[ed], or refus[ed]" to fulfill it. 9 U.S.C. § 4. Indeed, the statute *prohibits* the federal

court from going further. Once "satisfied that an agreement for arbitration has been made and has not been honored," *Prima Paint Corp.* v. *Flood & Conklin Mfg.*, 388 U.S. 395, 400 (1967), the court must order arbitration, 9 U.S.C. § 4. If the petition fails on either point, "the proceeding shall be dismissed." *Ibid.* In either event, the proceeding ends. Section 4 does not allow the court to decide a dispute it deems non-arbitrable; nor does it allow for ongoing jurisdiction over a dispute that the court sends to arbitration. A Section 4 proceeding decides only *who* can hear a particular dispute—arbitrators or courts—not any of the issues in the dispute itself. And it is the parties' agreement—ordinarily, though not inevitably, a state-law contract—that determines this "who" question. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter * * * courts generally * * * apply ordinary state-law principles that govern the formation of contracts.").[1]

To be sure, Section 4 arbitrability disputes sometimes require courts to interpret the FAA or implement its policies. But that does not give rise to Section 1331 jurisdiction. As the Fourth Circuit itself recognized, "[n]o one contends that [the FAA] in and

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[1] As explained below, see pp. 28-29, *infra*, a Section 4 petition will itself "arise under" federal law where federal law creates the arbitration obligation. Moreover, courts whose federal question jurisdiction is independently established may, and often do, direct arbitration of federal questions, as do courts whose jurisdiction is established by diversity of citizenship. See *Community State Bank* v. *Strong*, 485 F.3d 597, 626-627 (11th Cir.) (Marcus, J., specially concurring), reh'g en banc granted, 508 F.3d 576 (11th Cir. Sept. 10, 2007) (No. 06-11582).

of itself constitutes a federal question." Pet. App. 62a. Finding such jurisdiction, even when, as here, a case presents a substantial question about the meaning of the FAA itself, would contravene the principle that the statute "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 * * * or otherwise." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 n.9 (1984).

Nor does the presence of a federal question *in the dispute to be arbitrated* change anything. Because a Section 4 court cannot decide such a question, it stands inert and, so far as the Section 4 court is concerned, there is no federal question jurisdiction even though "a question of "federal law is lurking in the background." *Gully*, 299 U.S. at 117; accord *Morris* v. *City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994) (no federal question jurisdiction over a suit for violation of an agreement to settle Title VII claims). Indeed, this Court has twice rejected approaches to jurisdiction like the Fourth Circuit's. In *Mesa* v. *California*, 489 U.S. 121 (1989), this Court refused to adopt a broad, "plain language" interpretation of the federal officer removal statute, 28 U.S.C. § 1442(a), ruling instead that in light of the reasons Congress had conferred such jurisdiction, it should only apply to cases that presented a federal-law defense. And *Kokkonen* v. *Guardian Life Insurance Co.*, 511 U.S. 375 (1994), rejected a claim that federal jurisdiction extends to any action arising from an agreement to settle a federal lawsuit. This Court emphasized that, as here, "[t]he facts to be determined with regard to such alleged breaches of contract are quite separate from the facts to be determined in the principal suit." *Id.* at 381.

To the extent the Fourth Circuit addressed Section 1331 at all, it relied on a false analogy between Section 4 proceedings and actions under the Declaratory Judgment Act, 28 U.S.C. § 2201. Noting a statement in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), that "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question," Pet. App. 69a (quoting 463 U.S. at 19) (alteration in original), it asserted that looking through a Section 4 petition does "not 'chang[e] the rules' of federal question jurisdiction [but merely] appl[ies] the rules in the context of the FAA's procedural posture, just as the Supreme Court did with the Declaratory Judgment Act in *Franchise Tax Board*," Pet. App. 70a.

This is wrong for two reasons. First, although this Court has held that a federal claim in the coercive suit is a necessary element for "arising under" jurisdiction, it has never held that it is a sufficient one. In all the cases it has decided, the declaratory-judgment plaintiff himself has had a federal claim. *Textron Lycoming Reciprocating Engine Div.* v. *UAW*, 523 U.S. 653, 660 & n.4 (1998). That is not the case here. Second, and more important, the declaratory judgment analogy misses the central point. Even if the declaratory-judgment plaintiff did not himself have to assert a federal claim (but see *Textron*, 523 U.S. at 659-660) and the Declaratory Judgment Act thus would alter the ordinary application of the well-pleaded complaint doctrine, it would do so only because the dispute the federal court is asked to decide

is one otherwise within the court's "arising under" jurisdiction and one that it ordinarily would decide. No less than a suit seeking damages or injunctive relief, "the Declaratory Judgment Act plaintiff's right to relief still 'necessarily depends on resolution of a substantial question of federal law.'" *Community State Bank* v. *Strong*, 485 F.3d 597, 633 (11th Cir.) (Marcus, J., concurring), vacated, reh'g en banc granted, 508 F.3d 576 (11th Cir. Sept. 10, 2007) (No. 06-11582) (quoting *Franchise Tax Bd.*, 463 U.S. at 28). Here, in contrast, neither the Section 4 petition nor the response to it asks the federal court to resolve any federal question and the court cannot reach the merits of the underlying dispute in which any federal question is embedded.

In short, unless Section 4 impliedly repeals much of Section 1331 and pushes statutory "arising under" jurisdiction near the maximum Article III allows, there can be no federal question jurisdiction here. Any such argument would, moreover, face a very high hurdle. This Court has long disfavored repeals by implication and will not find one "unless the intention of the legislature to repeal [is] clear and manifest." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) (internal quotation marks omitted) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981)).

"[T]he deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes," *Romero*, 358 U.S. at 379, compounds this difficulty. As this Court has long held, "[d]ue regard for the rightful independence of state governments * * * requires that [federal courts] scrupulously confine their

own jurisdiction to the precise limits which the statute has defined." *Id.* at 380 (quoting *Healy*, 292 U.S. at 270). To succeed, then, respondents must show that Congress clearly and unambiguously intended in Section 4 to repeal many of Section 1331's jurisdictional limitations, all of which protect the autonomy of state courts. Any doubt or ambiguity counsels strongly against this Court expanding Section 1331's reach by "looking through."

II. THE FAA'S HISTORY, TEXT, STRUCTURE, AND PURPOSES ALL SHOW THAT CONGRESS INTENDED SECTION 4 TO OVERCOME THE OUSTER DOCTRINE, NOT TO REPEAL THE LIMITATIONS OF SECTION 1331

A. The FAA's History Reveals that Section 4 Was Meant to Provide a Means for Quick Specific Performance of Arbitration Agreements

The FAA addressed American courts' longstanding rejection of arbitration agreements—a stance based upon the English common law, which "refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). Through the FAA, Congress intended to rescind this rule and put arbitration agreements "upon the same footing as other contracts." *Volt Info. Scis.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (quoting

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

To fulfill this goal, the FAA had to overcome three discrete obstacles to enforcement of arbitration clauses. First, a number of courts found agreements to arbitrate void because they attempted to oust the courts of jurisdiction. See, *e.g.*, *United States Asphalt Ref. Co.* v. *Trinidad Lake Petroleum Co.*, 222 F. 1006, 1012 (S.D.N.Y. 1915); *Wood* v. *Humphrey*, 114 Mass. 185 (1873). Other courts allowed a party who had already agreed to arbitrate to revoke its consent at any time before the arbitrator's award. See, *e.g.*, *N.P. Sloan Co.* v. *Standard Chem. & Oil Co.*, 256 F. 451, 454-455 (5th Cir. 1918). Finally, some courts permitted enforcement of arbitration agreements at law—awarding nominal damages for breach of contract—but not in equity and so denied specific performance as a remedy. See, *e.g.*, *Perkins* v. *United States Elec. Light Co.*, 16 F. 513, 515 (2d Cir. 1881); *Tobey* v. *County of Bristol*, 23 F. Cas. 1313, 1321-1322 (C.C.D. Mass. 1845) (Story, J.); *Rison* v. *Moon*, 22 S.E. 165, 167 (Va. 1895).

Sections 2 and 4 of the FAA work in tandem to override this ouster doctrine. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable." But this declaration alone would not necessarily suffice to render arbitration agreements specifically enforceable in equity. They still could have been enforceable only in law for nominal damages. Section 4 thus fulfilled Congress's purpose by providing a "simple method for securing the performance of

an agreement to arbitrate." S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924).[2]

But Section 4 does more than merely make arbitration clauses specifically enforceable; it creates a unique, streamlined mechanism designed to avoid the "cumbersome" nature of the "old actions in the courts." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 35 (1924) (statement of Mr. Julius Henry Cohen) ("*Joint Hearings*"). Inspired by decades of similarly streamlined practice in New York, see pp. 34-35, *infra*, the FAA's Section 4 procedure "is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties." H.R. Rep. No. 96 at 2; *Joint Hearings* 39 (Section 4 actions "procee[d] with a minimum of legal intervention and the parties are

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[2] This general two-tiered approach was followed in contemporaneous state arbitration acts. Like Section 2 of the FAA, Section 2 of the 1920 New York Arbitration Act stated the general policy of the act by providing that arbitration clauses "shall be valid, enforceable and irrevocable." Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803. Specifically referencing the arbitration agreements "described in section 2," Section 3 of the New York Act provided a specialized remedial mechanism for aggrieved parties to secure specific performance. The same structural pattern appears in both the 1923 New Jersey Act, Act of Mar. 21, 1923, ch. 134, 1923 N.J. Laws 291, and the Uniform State Arbitration Act proposed by the American Bar Association, see Committee on Commerce, Trade and Commercial Law, *Report of the Forty-Fifth Annual Meeting of the American Bar Association* 318 app. C (1922).

assured of the same speedy and expert hearing which they originally desired").

Because this special petitioning process was previously unknown to federal law, Congress had to establish new jurisdictional rules that federal judges would understand how to apply. Unlike New York state courts, federal courts remained divided between law and equity.[3] Jurisdiction in a court of law did not provide jurisdiction in a court of equity. *Buzard* v. *Houston*, 119 U.S. 347, 351-353 (1886). So merely declaring arbitration agreements enforceable meant courts might still perceive themselves as ousted of equitable jurisdiction.

Congress solved this dilemma by describing jurisdiction over the unique proceedings created in Section 4 by analogy to familiar forms of action. See *Joint Hearings* 34 (allowing Section 4 suits "wherever under the Judicial Code [courts] would normally have jurisdiction of a controversy between the parties"). Prior to the FAA, a party seeking to compel arbitration would ordinarily have sued for specific performance of a contract. Although the particular lawsuit would have fallen to the doctrine of ouster, courts were well accustomed to examining their own jurisdiction over specific performance suits. *McCormick* v. *Oklahoma City*, 236 U.S. 657 (1915) (finding diversity

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[3] In New York, law and equity had merged over sixty years prior to the adoption of its state arbitration statute. See Act of Apr. 12, 1848, ch. 379, § 62, 1848 N.Y. Laws 510. Thus, when the New York arbitration statute provided jurisdiction for its courts to enforce an arbitration agreement, it had no reason to clarify that equity courts as well as those in law had jurisdiction—the statute's grant necessarily reached both.

jurisdiction over suit for specific performance, but insufficient allegations to support federal question jurisdiction); *Marsh* v. *Nichols, Shepard & Co.*, 140 U.S. 344 (1891) (concluding that suit for specific performance of contract involving patent did not present a federal question); see also *Great Lakes & St. Lawrence Transp. Co.* v. *Scranton Coal Co.*, 239 F. 603, 605 (7th Cir. 1917); *Joseph Dry Goods Co.* v. *Hecht*, 120 F. 760, 765-766 (5th Cir. 1903). In creating this new proceeding, Congress therefore used the phrase "would have jurisdiction * * * of a suit" to refer to jurisdiction over a hypothetical suit for specific performance. See pp. 35-36, *infra*. And it was firmly established that jurisdiction over a suit for specific performance was to be determined by the allegations on the face of the initial filing. James Love Hopkins, *The New Federal Equity Rules* 165-167 (5th ed. 1925) (quoting federal equity rule 25 as requiring "a short and plain statement of the grounds upon which the court's jurisdiction depends").

But it would not have been enough for Congress to simply say that one might petition any court that could have compelled specific performance between the parties. The phrase "would have jurisdiction" was itself ambiguous—"would have" under what rules? A federal court might conclude in a particular case that state-law ouster principles applied. See, *e.g.*, *Gatliff Coal Co.* v. *Cox*, 142 F.2d 876, 881 (6th Cir. 1944) (holding arbitration agreement not governed by the FAA invalid under Kentucky law as "an attempt to oust the legally constituted courts of their jurisdiction"). And if a court analyzed its jurisdiction under then-existing federal common law, it may well have found that ouster applied. See, *e.g.*, *Trott* v. *City*

Ins. Co., 24 F. Cas. 215, 217 (C.C.D. Me. 1860) (No. 14,189) (explaining that courts would not enforce "an [arbitration] agreement by a bill in equity, for a specific performance * * * as illfounded in point of jurisdiction"). So deeply entrenched was the ouster doctrine, in fact, that in some forms it persisted despite the FAA. See *Rae* v. *Luzerne County*, 58 F.2d 829, 830 (M.D. Pa. 1932) (finding ouster precluded arbitration defense in contract action).

Congress therefore carefully clarified in Section 4 that federal courts were no longer handcuffed by "ouster" and that they thus possessed equitable jurisdiction to compel arbitration. The phrase "save for such agreement" instructs the court to ignore this outmoded rule in examining its jurisdiction. See *Drexel Burnham Lambert, Inc.* v. *Valenzuela Bock*, 696 F. Supp. 957, 962-963 (S.D.N.Y. 1988) ("The likely intended meaning of the 'save for' clause is that the court which is otherwise vested of jurisdiction of the suit would not be divested by the arbitration agreement and may proceed to order arbitration, contrary to prior precedent."); see also *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263, 267-268 & n.6 (2d Cir. 1996) (adopting the interpretation of the *Valenzuela Bock* court); *Prudential-Bache Sec., Inc.* v. *Fitch*, 966 F.2d 981, 988 (5th Cir. 1992) (same).

Congress thus designed Section 4 to overturn the longstanding but widely criticized common-law rule and create a unique remedy analogous to, but not the same as, specific enforcement. The Fourth Circuit thought this nuanced, contextual understanding of history was "historically inaccurate." Pet. App. 65a n.2 (citing 1 Ian R. MacNeil et al., *Federal Arbitration Law* § 9.2.3.3 (1995)). Its view, however, rests not on

detailed historical argument, but only on negative implication from the absence of similar language in earlier state arbitration laws. The Fourth Circuit summarily stated that because the state arbitration statutes, which were also addressed to ouster, did not include the "save for" language, that language could not have been necessary to address ouster under the FAA. *Ibid.* But the States did not need such language; Congress did. The federal statute simply confronted additional discrete issues, including a division between law and equity, the potential applicability of state law, and the necessity of instructing federal courts of limited jurisdiction on a new process. Properly understood, history explains why Congress would have believed Section 4's special "save for" language was necessary to completely overcome ouster in the federal courts.

To properly interpret the FAA, one must both consider the background that Congress was legislating against and attend to the differences inherent in the federal system. Considering the division between law and equity in federal courts and the common-law background of arbitration agreements, Congress's reason for specifically referencing the abrogation of ouster in relation to specific performance in federal courts becomes apparent. When read in proper context, "save for such agreement" is neither a mystery nor a superfluity, but a necessary part of a coherent scheme.

B. The Fourth Circuit's Look-Through Approach Wrenches Phrases from Section 4 Out of Their Context, Ignores Title 9's Structure, and Creates Many Troubling Jurisdictional Gaps

In construing Section 4 as jurisdiction-conferring, the Fourth Circuit relied exclusively on what it took to be the "ordinary meaning" of three of Section 4's terms: "save for the agreement," "Title 28," and "controversy." Pet. App. 64a-66a. It made no attempt to square its conclusion with the surrounding text of that provision, with related provisions of the Act, with this Court's precedents, with background principles of federal jurisdiction, or with the Act's purposes. As those all make clear, Section 4 was intended to "provide[] a simple method for securing the performance of an arbitration agreement." S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924). It is not a clandestine conduit for expanding federal court jurisdiction. Indeed, on closer scrutiny, the Fourth Circuit's "plain meaning" interpretations fail on even their own terms.

To begin, the Fourth Circuit's conclusion that the statute's reference to "Title 28" supports transforming Section 4 from a procedural provision providing an expedited form of specific performance into a font of subject matter jurisdiction not only "read[s] too much into a benign reference," *Strong*, 485 F.3d at 626, but reflects a fundamentally mistaken premise. The Fourth Circuit reasoned that since Congress referenced Title 28 generally rather than referencing only specific parts, it must have intended that *all* of

its sections would furnish subject matter jurisdiction for Section 4 petitions, Pet. App. 65a-66a ("[W]here Congress knows how to say something but chooses not to, its silence is controlling." (citation omitted)), and that only a look-through rule would preserve federal question jurisdiction.

But this reasoning is erroneous. There are obvious situations when a petition to compel would itself arise under federal law. Determining jurisdiction based on the controversy the court is asked to resolve (rather than on the one the arbitrator would) does not "[s]ipho[n] off federal question jurisdiction from Title 28." Pet. App. 66a. For example, whenever federal law so preempts a field that arbitration agreements themselves arise under it, as is the case with the Employee Retirement Income Security Act, 29 U.S.C. § 1401 (establishing a federally required, de facto arbitration agreement between employers and plan sponsors of a multiemployer plan concerning determinations made under the ERISA provisions at 29 U.S.C. §§ 1381-1399); see *Strong*, 485 F.3d at 627 (Marcus, J., specially concurring), there would be federal question jurisdiction. This would also be true whenever federal law requires arbitration, *e.g.*, 16 U.S.C. § 5954(b)(2) (requiring disputes between concessioners in national parks and the Secretary of the Interior over the value of existing possessory interests to "be resolved through binding arbitration"), or whenever Congress has specifically stated that certain arbitration disputes "arise under" federal law, *e.g.*, 25 U.S.C. § 415(f) (declaring that actions pursuant to arbitration agreements contained in "any contract, including a lease, affecting land within the Gila River Indian Community" are civil actions "arising

under the Constitution, laws or treaties of the United States within the meaning of section 1331 of Title 28"); 25 U.S.C. § 416a(c) (same with respect to the Salt River Pima-Maricopa Indian Reservation). Actions to compel arbitration of "federal questions" will, moreover, arise in cases where jurisdiction is established on some other ground or where Section 1331 is independently satisfied.

Indeed, the Fourth Circuit's extravagant reading ignores the obvious, historically accurate—but "benign"—explanation for this statutory language. The supposedly significant term, "Title 28," dates back not to 1925, but rather to 1954, when it was placed in the statute as part of a housekeeping measure. S. Rep. No. 2498, 83d Cong., 2d Sess. 2, 9 (1954) (noting that "[t]he judicial code (of 1911) was repealed in 1948 when title 28 of the United States Code * * * was enacted into law," and that amendment was part of a broad program to correct obsolete "references in all such statutes and code titles"). The claim that Congress chose this language carefully with courts' power to compel arbitration of federal questions in mind ignores the historical reality that at that time there was serious doubt as to the arbitrability of federal statutory claims. See *Wilko* v. *Swan*, 346 U.S. 427, 438 (1953); see also *Mitsubishi Motors* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting). The original statutory reference to the "judicial code" seems equally innocuous as a shorthand way of capturing the two heads of jurisdiction under which arbitrability disputes had long found their way to federal court: diversity of citizenship and admiralty. Indeed, at that time, diversity and federal question jurisdiction were part of a single

section of the Judicial Code. Cf. 9 U.S.C. § 1 (defining "maritime transactions" and "commerce").

The whole notion that the reference to "Title 28" expresses a carefully considered legislative policy judgment strains credulity. "Title 28" covers much more than subject matter jurisdiction—only chapter 85 concerns that and even that chapter includes myriad provisions which Congress could hardly have intended to provide jurisdiction for Section 4 petitions. *E.g.*, 28 U.S.C. § 1365 (refusals to testify or to produce documents under Senate subpoenas); 28 U.S.C. § 1344 (granting district courts original jurisdiction in certain electoral disputes); 28 U.S.C. § 1357 (granting district courts original jurisdiction in civil actions "to enforce the right of citizens * * * to vote in any State").[4]

The Fourth Circuit's construction of the phrase "save for such agreement" fares no better. Noting the need to "give effect to every provision and word in a statute and avoid any interpretation that [would] render statutory terms meaningless or superfluous," the court of appeals identified the "common and ordinary meaning" of these four words as "but for" or "notwithstanding." Pet. App. 64a (citations and in-

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[4] The Fourth Circuit also failed to exclude the possibility that Congress referenced Title 28 generally not in order to include everything within it but to exclude everything outside it. Not only are many of the jurisdictional grants outside of Title 28 designed for specific situations not amenable to arbitration at all, but statutory grants of jurisdiction outside of Title 28 often eliminated the amount-in-controversy requirement that applied to Section 1331 until 1980. *E.g.*, 42 U.S.C. § 1971(d) (voting rights); 42 U.S.C. § 973h(c) (poll taxes); 42 U.S.C. § 973j(f) (voting rights).

ternal quotation marks omitted). But it then took an inexplicable turn:

> [I]n this context, "save for such agreement" must mean that the district court would have jurisdiction of the case *even if the agreement had never existed*. We thus read this phrase as an instruction to set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently. Indeed, we can think of no other reason why Congress would have chosen to include the "save for" language.

Pet. App. 64a-65a (footnote omitted) (emphasis added). Mistakenly relying on a single line from a treatise, see p. 26, *supra*, it thought the phrase could not have "been meant to solve the ouster problem," Pet. App. 65a n.2.

Apart from misunderstanding history, a history that explains why Congress would have relied on such language to "solve the ouster problem," see pp. 21-27, *supra*, the Fourth Circuit's reasoning fails on its own terms. "But for" and "notwithstanding"—the meanings it rightly gives to "save for"—are quite different from "even if," the term it employs to accomplish "look through." Both "but for such agreement" and "notwithstanding such agreement" imply that the agreement would block otherwise existing subject matter jurisdiction: an understanding consistent with ouster. "Even if the agreement had never existed," by contrast, implies that the agreement has *no* negative effect on jurisdiction at all. It can only add to, not subtract from, subject matter jurisdiction. Only by

turning its own plain-meaning argument upside-down could the Fourth Circuit squeeze expanded subject matter jurisdiction out of a jurisdictionally inert statute.

In doing so, the Fourth Circuit also violated its own cardinal rule of statutory interpretation: avoiding readings that "render statutory terms meaningless or superfluous." Pet. App. 64a. By twisting "save for such agreement" to mean "even if the agreement had never existed," the Fourth Circuit effectively evacuated this statutory term of any meaning. Under its reading, the term "save for such agreement" instructs a court to look through to see whether the court would have jurisdiction of a perhaps hypothetical suit resting on the underlying controversy—a controversy that the Court must leave to an arbitrator to decide. As bracketing the "save for" language shows, however, Section 4 would do exactly this *without* the key "save for" provision: A party * * * may petition any United States district court which [, save for such agreement,] would have jurisdiction * * * in a civil section or in admiralty of the subject matter of a suit arising out of the controversy between the parties." Section 4's use of the conditional "would" by itself accomplishes "look through"—given the Fourth Circuit's strained interpretation of the remaining terms—without the "save for" clause. This Court should reject the Fourth Circuit's unnatural reading of Section 4's key term because it reduces that term to "linguistic superfluity." *Scheidler* v. *National Org. for Women*, 547 U.S. 9, 21 (2006). Petitioner's reading, by contrast, does not. By according to the two words "save for" the "common understanding" that the Fourth Circuit itself concedes they have,

it gives the "save for" clause its intended ouster-denying effect.

The Fourth Circuit similarly misconstrued "controversy between the parties," the third leg on which its look-through interpretation stood. It found that this term must refer to either (1) "the discrete dispute about whether there is a valid arbitration agreement" or (2) "the underlying [dispute]," that is "the whole controversy between the parties," which lies "beyond the arbitration petition." Pet. App. 66a-67a. Between those two choices, it sided with the latter. The choice itself is false, however, and misunderstands why Congress used the phrase.

When New York enacted its arbitration law, it did so against a well-developed background of "special proceedings." These were judicial proceedings that differed greatly from ordinary lawsuits. An "action" under New York law was "an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." See N.Y. Code Civ. Pro. § 3333 (1920). A "special proceeding," by contrast, was "[e]very other prosecution by a party." *Id.* § 3334. New York thus distinguished between two different forms of arbitration practice. In so-called "common law arbitration," the court's role was confined to "actions"—basically full-blooded lawsuits. But the court could decide upon motion questions regarding "statutory arbitrations" under title 7 of the New York Code. *In re Di Carlo*, 13 N.Y.S. 83 (Sup. Ct. 1891) (concluding court had no jurisdiction over motion to set aside award from common-law arbitration). That is, statutory arbitrations provided expedited process in the

form of a "special proceeding." 1 J. Newton Fiero, *Practice in Special Proceedings in the Courts of Record of the State of New York* 86-87 (3d ed. 1912); *Gioia* v. *Gioia*, 12 N.Y.S.2d 729 (Sup. Ct. 1939) ("An action upon the award was the method of enforcement under the common law. The statutes do not prohibit that form of procedure * * * but render it obsolete by making the award a rule of court enforcible like a decision by the entry of judgment thereon."). Thus, in 1920, the New York drafters merely extended their existing swift process for enforcing arbitration awards to the new task of compelling arbitration in accord with predispute agreements.

This dual-track system was unknown to federal practice at the time of the FAA's enactment.[5] Before the Act took effect, a person seeking to compel arbitration would have had to file a suit in federal court for specific performance of the arbitration agreement, which would have failed on ouster grounds. *Tobey*, 23 F. Cas. at 1322 (finding that practicalities "must forever constitute, a complete bar to any attempt on the part of a court of equity to compel the specific performance of any agreement to refer to arbitration"). To provide expedited process for disputes about arbitration, then, Congress could

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[5] Indeed, the "special proceedings" distinction in New York arose from the Field Code of 1848, which merged law and equity and abandoned common law forms of action. Act of Apr. 12, 1848, ch. 379, §§ 1, 62, 1848 N.Y. Laws 497, 510. The federal system did not undertake any such systemization until the adoption of the Federal Rules of Civil Procedure in 1938—rules that were a "present-day interpretation and execution of what are at bottom the Field principles." Charles E. Clark, *Code Pleading and Practice Today*, in *David Dudley Field: Centenary Essays* 64 (1949).

not simply reference an existing fast-track practice, as New York could, but had to create one from scratch.

Congress had, moreover, a particular worry that New York did not. Since respect for state sovereignty limits the subject matter jurisdiction of the federal courts, Congress had to create special jurisdictional safeguards. Wanting to preserve strict jurisdictional neutrality—that is, neither expand nor contract the federal courts' ordinary subject matter jurisdiction—Congress instructed courts to analyze subject matter jurisdiction for the new special Section 4 proceedings the way they would have previously examined the more protracted equitable actions the new proceedings supplanted. In other words, Congress told courts to apply existing rules for determining subject matter jurisdiction over suits seeking specific contract performance to these new Section 4 proceedings. Thus, "a suit arising out of the controversy between the parties," 9 U.S.C. § 4, refers neither to the petition to compel arbitration itself nor to a suit on the more amorphous "underlying dispute"—the only two possibilities the Fourth Circuit saw—but to a traditional suit seeking specific performance of a contract, which the courts had much experience analyzing. See pp. 24-25, *supra*. Understood against the procedural background of the time, then, the term "a suit arising out of the controversy between the parties," 9 U.S.C. § 4, has no mystery and fully maintains the FAA's strict jurisdictional neutrality.

The Fourth Circuit, however, ignored Congress's concern with this strict neutrality principle—a concern so important that Congress rejected the single provision it did in the proposed bill exactly because it

would have expanded jurisdiction. A proposed Section 8 would have abolished the amount-in-controversy requirement for Section 4 petitions grounded on diversity jurisdiction. It stated:

> That if the basis of jurisdiction be diversity of citizenship * * *, the district court or courts which would have jurisdiction if the matter in controversy exceeded, exclusive of interest and costs, the sum or value of $3,000, shall have jurisdiction to proceed hereunder notwithstanding the amount in controversy is unascertained or is to be determined by arbitration."

Joint Hearings 3. The Senate Judicial Subcommittee, however, had this provision deleted from the bill "so as to preserve the jurisdiction of the federal courts." Committee on Commerce, Trade and Commercial Law, American Bar Association, *Report of the Forty-Seventh Annual American Bar Association Meeting* 284 (1924). And the American Bar Association, one of the bill's chief champions, noted Congress's great respect for jurisdictional neutrality. There was, the ABA explained, "considerable reluctance on the part of Congress to increase the jurisdiction of the federal courts." *Ibid.* In the face of such strong congressional concern that the FAA not alter background jurisdictional rules and understandings, the Fourth Circuit's strained reading of several of Section's 4's terms cannot justify a surreptitious and broad expansion of subject matter jurisdiction.

Chapter 2 of Title 9, which provides a mechanism for enforcing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, shows

clearly how hard the Fourth Circuit strained in reading Section 4. Two of its provisions, Sections 203 and 205, 9 U.S.C. §§ 203, 205, straightforwardly accomplish exactly what the Fourth Circuit believed Section 4 did by indirect and labored implication. As these two provisions demonstrate, when Congress wants to expand jurisdiction, it knows how to do so clearly and unequivocally. Section 202 sets the stage. It states that any "arbitration agreement or arbitral award arising out of a legal relationship * * * considered as commercial * * * falls under the Convention, excepting certain agreements among only United States citizens." 9 U.S.C. § 202. Section 203 then grants federal question jurisdiction to any action or proceeding concerning such agreements. It states that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States" and then goes on to make clear that the "district courts * * * shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203. In Section 203, Congress made it unmistakably clear both that it was expanding federal question jurisdiction and how far it was doing so. If it had intended Section 4 to repeal longstanding limits on Section 1331's grant, it could have made that equally clear. Using similar language would have unmistakably accomplished look-through jurisdiction. But, of course, Congress did not use any language even remotely like this.

Section 205 is to the same effect. It shows not only that if Congress had wanted to expand federal subject matter jurisdiction by repealing longstanding jurisdictional principles it knew how to do so clearly

and unequivocally, but also that it knew how to repeal the exact bar at issue here: the well-pleaded complaint rule. Section 205 provides for the removal of certain actions from state to federal court. Two of its features are notable. First, it shows that when Congress wanted to reference the underlying dispute subject to arbitration, it knew how to clearly do so. The first sentence of Section 205 provides that "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may * * * remove such action or proceeding." 9 U.S.C. § 205. If Congress had intended to authorize looking through to the underlying dispute subject to arbitration, it could easily have done in Section 4 as it did here.

Second and more important, the next sentence in Section 205 clearly and unequivocally repeals the well-pleaded complaint rule in removal actions. It states that "[t]he procedure for removal of causes otherwise provided by law shall apply, *except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.*" 9 U.S.C. § 205 (emphasis added). If Congress had wanted to permit look-through jurisdiction, it knew exactly how to do so without ambiguity.

As Section 205 shows, the terms "controversy between the parties" and "save for such agreement" cannot bear the burden the Fourth Circuit's reading requires. Since "[d]ue regard for the rightful independence of state governments" requires federal courts to "scrupulously confine their own jurisdiction," *Healy*, 292 U.S. at 270, this Court should not

interpret Section 4 to expand jurisdiction at the expense of state courts without clear authorization—especially when Congress has shown that it knew how to expand jurisdiction if it wanted. See *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108 (1941) (identifying congressional policy calling for strict construction of removal jurisdiction).

Look-through jurisdiction also leads to several serious jurisdictional gaps within the FAA itself. First, it creates an incomprehensible disconnect between Section 4 and Sections 7, 9, 10, and 11, thereby eviscerating the conception of the FAA as a "coherent regulatory scheme." *Watson* v. *United States*, 128 S. Ct. 579, 584 (2007). These sections specify how district courts should enforce arbitrators' subpoenas, 9 U.S.C. § 7, and confirm, *id.* § 9, vacate, *id.* § 10, or modify, *id.* § 11, their awards. They themselves confer no federal question jurisdiction. See *Moses H. Cone*, 460 U.S. at 25 n.32. As the courts of appeals have recognized, they "require an independent basis of subject matter jurisdiction." *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005) (Section 7).

None of these sections, however, contains a "save for" clause, mentions Title 28, or refers to "a suit arising out of the controversy between the parties," the three key ingredients of look-through jurisdiction. Under the Fourth Circuit's own view, then, these provisions cannot authorize look-through jurisdiction. *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) ("[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."). Interpreting Section 4's "save for" clause as permit-

ting look-through jurisdiction thus creates a gap in federal court jurisdiction over arbitration agreements. Under the Fourth Circuit's approach, a federal court could obtain jurisdiction to compel arbitration by looking through the petition itself—but then no federal court would be able to enforce the arbitrators' subpoenas or confirm, vacate, or modify their awards, since Sections 7 and 9-11 would not permit such "looking through." As at least one lower federal court has noted, "[i]t would be bizarre if a petition to compel arbitration could be brought in federal court while a petition to confirm or vacate the arbitration award in the same underlying dispute could not." *Valenzuela Bock*, 696 F. Supp. at 963. These latter petitions could be brought only in state court.

C. Look-Through Jurisdiction Contravenes the FAA's Clear Purposes and Thwarts Congress's Will

Not only did the Fourth Circuit disregard the relevant history and flout the statutory text and structure, it also contravened the FAA's core purposes and ignored basic principles governing the allocation of responsibility between state and federal courts, thereby raising difficult constitutional questions.

This Court has emphasized Congress's intention (1) "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone*, 460 U.S. at 22; (2) to respect (in cases where arbitration has been agreed to) the arbitrator's authority to resolve the substantive dispute, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S.

444, 451-452 (2003); and (3) to "make arbitration agreements as enforceable as other contracts, *but not more so*," *Prima Paint*, 388 U.S. at 404 n.12 (emphasis added). The Fourth Circuit's rule fails to accomplish any of these goals.

First, as this case vividly demonstrates, the look-through approach thwarts "Congress's clear intent" that arbitrable disputes move "out of court * * * as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. Far from a "summary and speedy" process, *id.* at 29, this case has meandered up and down through the federal courts for almost five years, generating hundreds of pages of record and multiple opinions devoted to unraveling recondite and sometimes fact-intensive matters of law—solely to establish whether the district court has "jurisdiction" to decide whether or not the parties should go to arbitration.

And this is no anomaly. The other appellate decisions applying the look-through approach required similarly complex and protracted proceedings. *Tamiami Partners, Ltd.* v. *Miccosukee Tribe*, 177 F.3d 1212 (11th Cir. 1999); *Strong*, 485 F.3d 597. In *Tamiami*, the arbitrators only got the case after three sojourns in the court of appeals.[6] *Strong* was a Section 4 pro-

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[6] As Judge Marcus observed, see *Strong*, 485 F.3d at 627 nn. 11 & 12, the decision that launched the look-through line of cases, *Tamiami*, did not actually require look-through to establish Section 1331 jurisdiction. In addition to seeking arbitration, petitioners in that case raised other substantive claims that provided federal question jurisdiction. And the arbitration agreement itself arguably arose under federal law, since a federal statute required alternative dispute resolution.

ceeding initiated after the petitioner's unsuccessful attempt to remove the same litigation to federal court, 485 F.3d at 603-604—resulting in a 32-page opinion followed by a 48-page concurrence.

And as Judge Marcus recognized, complex "jurisdictional" disputes and the as-of-right appeals they precipitate naturally result from any look-through approach. *Id.* at 634 (noting "significant number of cases" in which look-through determination will be difficult). Even a state-law cause of action could be deemed to present a federal question, *e.g.*, through "complete preemption" (cases similar to this one); by "implicating significant federal issues," *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005); or by theorizing that the Section 4 respondent *could have* pleaded a federal claim, *Strong*, 485 F.3d at 607-608. Each of these possibilities raises fact-intensive and "litigation-provoking" difficulties the federal courts would be wise to avoid. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting).

Beyond the sheer *amount* of court time the look-through approach necessitates, such proceedings frequently require the courts to delve into substantive issues that the arbitrator should decide. See, *e.g.*, *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445-446 (2006); *Green Tree Fin. Corp.*, 539 U.S. at 452. Here, for example, determining whether Discover Bank was the "real party in interest" entailed "look[ing] carefully at the facts" of "the unique and complex relationships among the parties through the various stages of the litigation," Pet. App. 13a, including analyzing, *inter alia*, Ms. Vaden's cardmember agreement, agreements between Discover Bank and

DFS, financial statements, annual reports, and press releases, *Id.* at 14a-18a. This investigation led the Fourth Circuit to conclude, as a matter of first impression, that Section 27(a) of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d(a), effects "complete preemption." Pet. App. 18a-25a. Where the parties agree to refer "any past, present or future claim or dispute" to arbitration, J.A. 44-45, however, these kinds of complex inquiries are to be decided by the arbitrator, not the courts. *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002). As Judge Marcus observed, "[a]n interpretation of the FAA that requires the district court to strongly suggest an answer to the merits of the parties' underlying dispute, but merely as a means of determining whether it has subject matter jurisdiction to enforce a contractual agreement to send that dispute to the *arbitrator* for resolution, can only be described as odd." *Strong*, 485 F.3d at 634.

By contrast, if respondents had sought the very same arbitration order from the Maryland court where Ms. Vaden's claims were already pending (in a suit DFS had initiated) *there would have been no need* to decide the "complete preemption" question or any of the related factual and legal issues the federal courts believed the look-through rule obliged them to resolve. To the contrary, the State court's subject matter jurisdiction would have been beyond dispute, *Southland*, 465 U.S. at 10, and its resolution of Discover's breach-of-arbitration-agreement claim would have been confined to precisely the sort of "restricted inquiry into factual issues," *Moses H. Cone*, 460 U.S. at 22, that Congress intended.

The look-through approach requires federal courts to decide unnecessary questions, ones that do not resolve the parties' actual substantive quarrel, and ones that are entirely beyond the scope of the narrow dispute the federal court is instructed to decide—whether a covered arbitration agreement exists and whether it has been breached. In *Strong*, the Eleventh Circuit found federal question jurisdiction by looking through—indeed, entirely *past*—both the arbitration petition *and the respondent's state court complaint*, concluding that the possibility that the plaintiff could amend the complaint, which stated only Georgia RICO claims, to include a federal cause of action, made the arbitrability question "federal" for Section 1331 purposes. 485 F.3d at 608-609.

The Fourth Circuit inverted the basic rules of restraint that guide federal courts, *i.e.*, that they should not "decide abstract, hypothetical or contingent questions * * * [or] any constitutional question in advance of the necessity for its decision * * * [or] decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Fed'n of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945). It created serious and needless friction between state and federal courts—surely nothing Congress intended in enacting the FAA. Congress did not streamline the Section 4 process and limit the right to jury trial so that federal courts could decide important and complex questions summarily; it did so because it did not intend for Section 4 courts to delve into these issues at all.

III. LOOKING THROUGH TO GROUND JURISDICTION IN A COMPLETELY PREEMPTED STATE-LAW COUNTERCLAIM CONFLICTS WITH THIS COURT'S DECISION IN *HOLMES GROUP* AND VIOLATES THE BEDROCK PRINCIPLES OF FEDERALISM AND JUDICIAL ADMINISTRATION ON WHICH IT RESTS

Even if Section 4 were to allow look-through jurisdiction—and it does not—the Fourth Circuit's finding of jurisdiction in *Vaden II* would still violate Section 1331. A federal court hearing a Section 4 petition, like a court determining jurisdiction in an ordinary suit, cannot ground federal question jurisdiction in a federal counterclaim, let alone a completely preempted state-law counterclaim, in a suit pending in state court. Yet, the Fourth Circuit did so and thus disregarded in another way this Court's longstanding adherence to the well-pleaded complaint rule and the principles of federalism and efficient litigation that the rule embodies.

In this case, the district court did not have to look through the petition to an inchoate, loosely defined dispute. The "overall substantive conflict between the parties," Pet. App. 66a, was already crystallized in the suit DFS had brought against Ms. Vaden in state court. As Judge Goodwin recognized, *id.* at 32a-38a, the district court would *not* have had jurisdiction over that case, both because a plaintiff may not remove its own case to federal court, see *Shamrock Oil*, 313 U.S. at 107-108, and because this Court held in *Holmes Group*, 535 U.S. at 830, that the presence of a federal *counterclaim* cannot bring a case within fed-

eral courts' "arising under" jurisdiction.[7] See *id.* at 832 (refusing to "transform the longstanding well-pleaded-complaint rule into the well-pleaded-complaint-*or-counterclaim* rule").

It makes no sense to claim that the well-pleaded complaint rule precludes a federal court from basing Section 1331 jurisdiction on a *federal* counterclaim but permits jurisdiction based on a "completely pre-empted" state-law counterclaim. As this Court has explained, the "complete preemption" doctrine is not an *exception* to the well-pleaded complaint rule relied on in *Holmes Group*, but rather a "corollary" to it. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987) (citations omitted). The doctrine operates by "convert[ing] an ordinary state common-law complaint into one stating a federal claim *for purposes of the well-pleaded complaint rule.*" *Ibid.* (emphasis added and citation omitted). And there is no reason why, if an avowedly and undeniably federal *counterclaim* like the one in *Holmes Group* is legally insufficient "for purposes of the well-pleaded complaint rule," a "convert[ed]" one warrants different treatment. If anything, exactly the opposite rule would make sense. There is more to be said, after all, for an ex-

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[7] Although *Holmes Group* involved the Federal Circuit's appellate jurisdiction, which itself turns on whether the district court's jurisdiction rested on 28 U.S.C. § 1338, see 28 U.S.C. § 1295(a)(1), the Court explained that "linguistic consistency" required "the same test to determine whether a case arises under § 1338(a) as under § 1331," 535 U.S. at 830 (citation omitted), and its conclusion that counterclaims cannot supply "arising under" jurisdiction has been applied, correctly, in cases involving district courts' original jurisdiction. See, *e.g.*, *Aetna Health* v. *Kirshner*, 415 F. Supp. 2d 109 (D. Conn. 2006).

ception for counterclaims of the kind at issue in *Holmes Group*, which concerned disputes that Congress had committed to the *exclusive* jurisdiction of a particular court in order to promote uniformity. See *Holmes Group*, 535 U.S. at 833 (recognizing uniformity as reason for assigning certain appeals involving patents to Federal Circuit); *id.* at 838 (Stevens, J., concurring in part and concurring in the judgment) (same); *id.* at 840 (Ginsburg, J., concurring in the judgment) (same). The counterclaims at issue here, by contrast, lie within state-court concurrent jurisdiction and, in any event, since arbitrators, not a court, would ultimately decide their merits, promoting uniformity cannot be a concern.

The Fourth Circuit believed otherwise, however, and distinguished *Holmes Group* on the single ground that it "did not * * * involve complete preemption." Pet. App. 10a n.4. It believed this doctrine operated so powerfully that it completely "overr[ode] such fundamental cornerstones of federal subject matter jurisdiction as the well-pleaded complaint rule and the principle that the plaintiff is master of the complaint." *Ibid.* (quoting 14B Charles Alan Wright et al., *Federal Practice and Procedure* § 3722.1, at 511 (3d ed. 1998)). In particular, it believed that completely preempted "claims are so necessarily federal that they will always permit removal to federal court, *even if they are raised only by way of defense.*" *Ibid.* (quoting 14B Wright § 3722.1, at 511) (internal quotation marks omitted) (emphasis added). In other words, the Fourth Circuit thought that raising a completely preempted state-law counterclaim (although not a federal counterclaim) as a defense could by itself furnish federal question jurisdiction.

This is mistaken. Although the Fourth Circuit quotes the treatise, it omits a crucial qualifier and wildly misunderstands the passage's meaning. The treatise makes the unremarkable point that, when a defendant successfully raises the *defense of complete preemption* and so points out that federal law states the only claim that the plaintiff could conceivably bring, the plaintiff's initial state law claim is deemed federal for jurisdictional purposes. It was only in "*this* sense," 14B Wright § 3722.1, at 510 (emphasis added), that complete preemption works an exception to the well-pleaded complaint rule. Thus, the treatise does *not* take the position that a plaintiff's original state-law complaint should be deemed federal for jurisdictional purposes merely because the defendant raises in a responsive pleading some other provision of state law that is itself completely preempted. That would be unprecedented. None of the cases the treatise cites stands for that remarkable position, the Fourth Circuit cited none, and Ms. Vaden has discovered none. Certainly no case decided by this Court has so held. The complete preemption doctrine merely recognizes that for purposes of the well-pleaded complaint rule federal law sometimes so pervasively occupies an area of law that any claim, even those pleaded under state law, must be deemed federal. It does *not* permit a federal court to ground jurisdiction on a federal issue appearing *anywhere* in a lawsuit. But that is effectively the Fourth Circuit's position.

The Fourth Circuit's single attempt to square its approach with the policies underlying *Holmes Group* also fails. In *Holmes Group*, this Court identified three "longstanding policies" that a well-pleaded

counterclaim rule would violate: (1) allowing plaintiff to remain "master of the complaint," (2) maintaining "due regard for the rightful independence of state governments" by not "radically expand[ing] the class of removable cases," and (3) preserving "the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a quick rule of thumb for resolving jurisdictional conflicts." 535 U.S. at 831-832 (citations and internal quotation marks omitted). The Fourth Circuit addressed only the first of these policies, arguing that "[t]here is no danger that defendant Vaden might frustrate Discover Bank's choice of state forum" because "it is Discover who filed the arbitration complaint in federal court." Pet. App. 10a n.4. That is trivially true, of course, but at most it shows no harm to this first policy construed at its narrowest.[8] Allowing completely preempted state law counterclaims to furnish jurisdiction for Section 4 petitions does, however, violate this policy's natural and equally important corollary: that neither defendants *nor* plaintiffs may opportunistically switch courts. See *Shamrock Oil*, 313 U.S. at 106 n. 2.

The Fourth Circuit's failure to address the other two "longstanding policies" a well-pleaded-counterclaim rule would violate—"due regard for * * *

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[8] The understanding that led the Fourth Circuit to mistakenly conclude that a completely preempted counterclaim may furnish jurisdiction—that a completely preempted state-law *defense* would furnish removal jurisdiction—certainly violates this policy, even construed at its narrowest. It would allow the defendant, not the plaintiff, to determine whether a case containing only state-law claims would be heard in a state or federal forum.

state governments" and "clarity and ease of administration"—is understandable. Its approach does both policies much violence. Discover seeks here to maintain its suit against Ms. Vaden in state court while petitioning a federal court for arbitration of her counterclaims. Already in state court, it is trying to take to federal court a second-order issue concerning the same basic controversy—whether certain of the first-order disputes included in the lawsuit are subject to arbitration—that the state court is perfectly able to decide and must decide, if asked. This piecemeal approach to litigation not only unnecessarily fractures and multiplies the proceedings, but also disrespects the state court's authority to decide issues properly presented to it. It also unnecessarily creates potential friction between state and federal courts. Must the state court, for example, give preclusive effect to issues decided by the federal court in summarily determining whether it has jurisdiction, including here complex issues surrounding the relationships of the various parties?[9] Likewise, should the state court

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[9] In this case, for example, the state and federal courts are proceeding under completely different theories of whom Ms. Vaden held her account with—DFS or Discover Bank. In the pending state court proceeding DFS filed against Ms. Vaden, DFS, not Discover Bank, is the only plaintiff and it submitted interrogatories asking Ms. Vaden to admit that she had an account with DFS (according to Ms. Vaden's answers). C.A. J.A. 488. In the federal Section 4 proceedings, by contrast, DFS and Discover Bank submitted a declaration stating that the account was with Discover Bank. C.A. J.A. 498. To the Fourth Circuit, this change was significant because only Discover Bank, a federally insured bank, could assert the 12 U.S.C. § 1831d(a) defense that completely preempted Ms. Vaden's state-law counterclaims and conferred federal sub-

stay its hand if the federal-court defendant seeks to head off the Section 4 proceedings by asking it for a declaration that the dispute is *not* arbitrable? Permitting parties to move opportunistically from one court system to another cannot help but create difficult problems of this sort.

IV. DISCOVER'S LACK OF STANDING IS AN ALTERNATIVE GROUND FOR REVERSAL

Although this Court may—and should—reverse because the Fourth Circuit misconstrued the statute, there is a further problem. Discover filed its Section 4 petition in federal court when Ms. Vaden was not even arguably in breach of the (alleged) arbitration agreement. It therefore did not establish the "injury in fact" that is an indispensable prerequisite for Article III standing. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); see also *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007) ("[A] federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'") (quoting *Ruhrgas A.G.* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999)).

Discover sought arbitration under a contract provision allowing it to "*elect* to resolve [a covered] claim or dispute by binding arbitration." J.A. 44-45 (emphasis added). Indeed, DFS's claims against Ms. Vaden, unlike her counterclaims, remain pending in state court. Because arbitration was not mandatory, litigating her claim could not itself constitute "ne-

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ject matter jurisdiction under *Vaden II*'s well-pleaded counterclaim rule.

glect" of any legal obligation. Thus, although Discover's petition asserted that Ms. Vaden's state law counterclaims were arbitrable, it failed to identify any "legally protected interest," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), that had been invaded by her raising them to the state court.

Nor did Discover allege that Ms. Vaden had refused a formal (or informal) arbitration demand before filing its Section 4 petition in federal court. See *PaineWebber, Inc.* v. *Faragalli*, 61 F.3d 1063, 1066 (3d Cir. 1995) (party cannot seek enforcement of FAA § 4 until the opposing party "unequivocally refuses to arbitrate, either by failing to comply with an arbitration demand or by otherwise unambiguously manifesting an intention not to arbitrate"); *Reconstruction Fin. Corp.* v. *Harrisons & Crosfield*, 204 F.2d 366, 369 (2d Cir. 1953) ("The 'cause of action' for breach of the obligation to arbitrate did not 'accrue' until defendant recently asked Reconstruction Finance Corporation to arbitrate the 'controversy,' and Reconstruction Finance Corporation then refused to comply."); *Hanes Corp.* v. *Millard*, 531 F.2d 585, 600 n.12 (D.C. Cir. 1976) ("[S]tatute [of limitations] could not begin to run until the [arbitration] agreement was broken, that is to say, until arbitration was sought by one party and refused by the other."); 1 Martin Domke, *Domke on Commercial Arbitration* § 22:2 (3d ed. 2003) (noting that for a court to order arbitration the demand for arbitration must be "timely made"). Discover thus had no actionable injury under the statute whatsoever. See *Faragalli*, 61 F.3d at 1067 ("[I]t is doubtful that a petition to compel arbitration filed before the 'adverse' party has refused arbitration

would present an Article III court with a justiciable case or controversy in the first instance.").

The Fourth Circuit brushed aside this jurisdictional problem, concluding that Ms. Vaden's conduct *in this litigation—i.e.,* resisting Discover's petition, rather than acquiescing in it—established her refusal to arbitrate within the meaning of the statute. Pet. App. 27a n.20. But that conclusion is manifestly unsound.

First, the single precedent it relied on, *Faragalli*, 61 F.3d 1063, concerned a mandatory, not elective, obligation to arbitrate. *Id.* at 1064 ("Any controversy * * * shall be settled by arbitration."). Under a mandatory arbitration regime, suing may perhaps represent a breach of obligation. Under an elective regime, it cannot. What the *Faragalli* court noted in the context of mandatory arbitration agreements applies with added force to elective ones:

> Clearly, unless the respondent has resisted arbitration, the petitioner has not been "aggrieved" by anything. The reason for this rule, though little discussed, is evident: unless and until an adverse party has refused to arbitrate a dispute putatively governed by a contractual arbitration clause, no breach of contract has occurred, no dispute over whether to arbitrate has arisen, and no harm has befallen the petitioner-hence, the petitioner cannot claim to be "aggrieved" under the FAA. * * * Moreover, it is doubtful that a petition to compel arbitration filed before the "adverse" party has refused arbitration would present an Article III court

> with a justiciable case or controversy in the first instance.

Id. at 1067 (citations omitted).

Second, the Fourth Circuit's view contravenes the black letter rule that Article III standing must be established "as of the commencement of suit." *Lujan*, 504 U.S. at 571 n.5 (plurality opinion); see also *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("[W]e have an obligation to assure ourselves that [plaintiff] had Article III standing at the outset of the litigation."); *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993) ("[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought." (quoting *Mollan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.))). Third, if "injury" attributable to maintaining litigation were constitutionally sufficient, the "injury in fact" requirement—the "irreducible [constitutional] minimum"—would be no limitation at all. *Spann* v. *Colonial Vill.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (a litigant "cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit").

The Fourth Circuit's view also creates non-constitutional difficulties. If non-acquiescence in an opponent's Section 4 petition could be pronounced "refusal" *nunc pro tunc*, Ms. Vaden, who was never even asked to arbitrate, could never raise that defense in a Section 4 proceeding, and the statutory limitation to parties "aggrieved by the alleged failure, neglect, or refusal * * * to arbitrate under a written agreement for arbitration" would be rendered nugatory. By allowing litigants like Discover a straight-to-court remedy that Congress did not provide, the Fourth Circuit

rule ignores the practical benefits served by the arbitration-demand process and involves federal courts in disputes where judicial intervention is not actually needed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded to be dismissed for lack of jurisdiction.

Respectfully submitted.

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APPENDIX

APPENDIX A

9 U.S.C., Chapter 1

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, ir-

revocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be

served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the

same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting

the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with

the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292 (b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

APPENDIX B

Title 9, Chapter 2

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated

in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

RESPONDENT'S BRIEF

401

(7)

Supreme Court, U.S.
FILED
AUG 1 - 2008
OFFICE OF THE CLERK

No. 07-773

IN THE

Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

(1) Whether the court of appeals correctly ruled that the district court had jurisdiction to compel arbitration under Section 4 of the Federal Arbitration Act where the parties' underlying dispute is completely preempted by federal banking law.

(2) Whether the court of appeals correctly ruled that the district court's exercise of jurisdiction to compel arbitration under Section 4 of the Federal Arbitration Act is consistent with this Court's decision in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002).

RULE 29.6 DISCLOSURE

DFS Services LLC (f/k/a Discover Financial Services LLC f/k/a Discover Financial Services, Inc.) and Discover Bank are wholly owned subsidiaries of the ultimate (publicly held) parent company, Discover Financial Services (f/k/a NOVUS Credit Services Inc.).

No publicly held company owns more than 10% of the stock of Discover Financial Services.

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COUNTERSTATEMENT OF THE CASE

The fundamental issue presented by this case is whether Section 4 of the Federal Arbitration Act ("FAA") means what it says when it plainly provides that a district court may compel arbitration when, "save for" the agreement to arbitrate, it "would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4.

On that issue, Petitioner Betty Vaden ("Petitioner") nowhere disputes the determination – supported by the Federal Deposit Insurance Corporation ("FDIC") below – that the controversy between the parties over the legality of interest payments and other fees by Discover Bank was "completely preempted" and thus is solely "based on federal law." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003). As such, the court of appeals properly affirmed the district court's determination that it "would have jurisdiction under title 28 . . . of the subject matter of a suit arising out of the controversy between the parties," and it thus had jurisdiction to "direc[t] that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

That straightforward conclusion follows the analysis of Section 4 in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, where this Court noted that although the FAA provides no "independent" grant of jurisdiction, it does, through Section 4, "provid[e] for an order compelling arbitration only *when the federal district court would have jurisdiction over a suit on the underlying dispute*." 460 U.S. 1, 25 n.32 (1984) (emphasis added). Under *Moses H. Cone*, a district court is obligated to address a petition to compel arbitration

under Section 4 where, as here, the parties' agreement is subject to the FAA and where the court "would have subject matter jurisdiction" over "a suit arising out of the controversy between the parties." 9 U.S.C. § 4.

Petitioner studiously avoids the plain language of Section 4 and this Court's statements in *Moses H. Cone*. Instead, petitioner argues that the issue presented is whether "Congress clearly and unambiguously intended in Section 4 to repeal many of Section 1331's jurisdictional limitations." Pet. Br. 21. But petitioner's argument is precisely backwards. Although Section 2 of the FAA creates a federal substantive right, this Court has explained that the FAA is anomalous in that it creates no "independent" grant of jurisdiction. That conclusion was based upon an analysis of Sections 3 and 4, each of which reflects that Congress sought to limit federal court jurisdiction to the circumstances set forth in those provisions. The appropriate issue thus is whether Section 4 authorizes a district court to exercise its authority to compel arbitration under the FAA.

When petitioner finally addresses the language of Section 4, she advances an implausible interpretation that would render Section 4 irrelevant in all, or virtually all, real-world circumstances where a party seeks to compel arbitration when there is not already a pending federal lawsuit. Under petitioner's view, a district court is not permitted to "look through" the petition to compel arbitration to the underlying controversy that one of the parties seeks to arbitrate. Pet. Br. 11-12. That, however, is precisely what the language of Section 4 requires – a determination whether the court "would have jurisdiction under title 28, in a civil action or in admiralty of the subject

matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4.

Petitioner's position effectively would render Section 4 irrelevant not only in cases involving disputes that arise out of federal law, but also in cases where the underlying disputes would support diversity jurisdiction because the amount in controversy requirement requires courts to "look through" the Section 4 petition to the underlying dispute to assess the amount in controversy. *E.g.*, *Doctor's Assocs., Inc.* v. *Hamilton*, 150 F.3d 157, 160-61 (2d Cir. 1998). As petitioner acknowledges, Section 4 applies where a party neglects or refuses to arbitrate a dispute including cases where no complaint has been filed at all. Pet. Br. 4. Under her interpretation, however, Section 4 would be relegated to a curiosity, available as an independent basis to compel arbitration only when the agreement to arbitrate involved matters such as land disputes within "the Gila River Indian Community." *Id.* at 29. Petitioner's request that this Court should misread and trivialize Section 4 should be denied.

STATUTORY BACKGROUND

Congress passed the Federal Arbitration Act ("FAA") in 1925. The "preeminent concern of Congress" was "to ensure judicial enforcement of privately made agreements to arbitrate" by "overul[ing] the judiciary's longstanding refusal" to do so. *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-21 (1985); see also *Allied-Bruce Terminix Cos., Inc.* v. *Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."). Indeed, Congress enacted the FAA in "response to hostility of American courts to the enforcement of

arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001); see *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985). This judicial hostility took several forms, including refusing to give effect to arbitration agreements, declining to enforce them through specific performance, and denying stays of judicial proceedings in favor of arbitration. See *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-21 (1924).

Section 2 of the FAA directly addresses this judicial hostility, providing that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, "[t]he effect of [Section 2] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24; see also *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984) (same).[1]

Although Section 2 creates a body of substantive federal law, this Court has concluded that "it does not create any *independent* federal-question jurisdiction."

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[1] Before the FAA will apply, a court must determine whether the agreement to arbitrate is contained in a "maritime transaction" or a contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. Likewise, before arbitration may be compelled, the court must decide whether the parties' underlying dispute is subject to arbitration under their agreement. *Mitsubishi Motors Corp.*, 473 U.S. at 626.

Southland, 465, U.S. at 15 n.9 (emphasis added). That is, Congress did not intend to confer jurisdiction in every case solely because the parties' agreement to arbitrate fell within the scope of Section 2 of the FAA.[2] This "anomaly" in the area of federal subject matter jurisdiction, *Moses H. Cone*, 460 U.S. at 25 n.32, is "implicit" in the language of FAA Sections 3 and 4, which set forth jurisdictional bases for a court to stay litigation and enforce arbitration under the FAA, *Southland*, 465 U.S. at 15 n.9.

Specifically, Section 3 allows a court to enter a stay of litigation only where there already is a "suit or proceeding" before the court, 9 U.S.C. § 3, and therefore presupposes an independent source of jurisdiction because a "court cannot stay a suit pending before it unless there is such a suit in existence." *Moses H. Cone*, 460 U.S. at 25 n.32. Likewise, Section 4 provides that a party may petition the court for an order compelling arbitration when it is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." 9 U.S.C. § 4. That authority is contingent on a further determination that, "save for" the agreement to arbitrate, the court "would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out the controversy between the parties." *Id.*;

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[2] In contrast, the Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1970, provides that a proceeding under its coverage "shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203. Chapter 2 of the FAA thus provides an independent grant of jurisdiction to compel arbitration and to confirm or set aside arbitration awards for international disputes.

Moses H. Cone, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 15 n.9.

Historically, Section 4 petitions for arbitration have been brought in two different types of cases. If there is pending litigation before the district court, a petition for relief under Section 4 is known as an "embedded" proceeding, *i.e.*, the case before the district court involves "both a request for arbitration and other claims for relief." *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79, 87 (2000). Section 4 also contemplates "independent" proceedings where the request to compel "arbitration is the sole issue before the court." *Id.*; see also *The Anaconda* v. *American Sugar Ref. Co.*, 322 U.S. 42, 45 (1944) ("From [Section 4] it is clear that the parties may proceed in an admiralty case without the customary libel and seizure"). Indeed, "[n]ormally, [Section 4] motions are brought in independent proceedings." *Hartford Fin. Sys.* v. *Florida Software Servs.*, 712 F.2d 724, 728 (1st Cir. 1983) (Breyer, J.) (citing cases).

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Respondent Discover Bank, a federally insured bank, issued a Discover credit card to Petitioner Betty Vaden. Pet. App. 4a. In June 1999, petitioner's credit account attained Platinum status, *id.*, and, in July 1999, she was sent an amendment to her Cardmember Agreement that included a broad arbitration clause allowing either party to elect binding arbitration as the means to settle "'any past, present or future claim or dispute . . . arising from or relating to'" her account, her past accounts, or the enforceability of the arbitration clause, the Cardmember Agreement, or any prior agreement. *Id.* at 49a-50a; see also *id.* at 4a-5a, 77a.

In July 2003, because petitioner failed to pay her credit card balance of over $10,000, Discover Bank, through its servicing affiliate, Discover Financial Services, Inc. ("DFS"), sued petitioner for nonpayment in Maryland state court. Pet. App. 5a. In response, petitioner filed class-action counterclaims against DFS based on contract law and various state anti-usury statutes. *Id.* As relevant here, petitioner sought to represent a class action, claiming that she and others were assessed finance charges, late fees, and interest in violation of Maryland law. Joint Appendix ("JA") 29-30.

Discover Bank then sought to vindicate its federal right to compel arbitration in federal court. Invoking Section 4 of the FAA, Discover Bank and DFS (collectively "Discover") filed a petition to compel arbitration in the United States District Court for the District of Maryland. JA 28-42. Discover alleged that "resolution of [petitioner's] claims that Discover Bank charged illegal finance charges, interest and late fees involve questions of federal law under 28 U.S.C. § 1331." JA 30 ¶ 8. Discover further alleged that Counts I through III of petitioner's state-law counterclaims were completely preempted by Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d(a). *Id.*

Petitioner sought to avoid arbitration. She argued that the arbitration amendment only applied to Platinum cardholders and that she had not been a Platinum cardholder at the time the amendment was issued. Pet. App. 51a-52a. Petitioner also disputed Discover Bank's standing to compel arbitration because she had filed her counterclaims against DFS, not Discover Bank. *Id.* at 60a-61a.

The district court held that the parties had entered into a valid and enforceable arbitration agreement,

Pet. App. 83a-86a, and therefore granted Discover Bank's motion to compel arbitration, *id.* at 88a, 89a. On appeal, the Fourth Circuit rejected petitioner's argument that the district court lacked subject matter jurisdiction over Discover Bank's petition to compel arbitration. *Id.* at 61a-63a. It looked to this Court's opinion in *Moses H. Cone*, which states that "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute." 460 U.S. at 25 n.32. See Pet. App. 62a. Following *Moses H. Cone*, the court of appeals held that a district court may address a Section 4 petition to compel arbitration if, "but for the arbitration agreement," there would be "subject matter jurisdiction" over "a properly invoked federal question in the underlying dispute." *Id.* at 72a.

The court of appeals remanded the case to allow the district court to address matters relevant to the district court's subject matter jurisdiction. Pet. App. 73a. On remand, the district court ruled that it had subject matter jurisdiction to compel arbitration of the parties' dispute. *Id.* at 48a. Specifically, the district court noted that petitioner "concedes that the FDIA completely preempts" state claims including petitioner's challenges to her interest rate if made "against a federally insured bank such as Discover Bank." *Id.* at 46a. The district court determined that "Discover Bank, not DFS, is the true lender and that [petitioner's] counterclaims are directed against the alleged unlawful terms of the loan, not DFS' servicing of the loan." *Id.* at 48a. The district court concluded that "[t]he complete preemption doctrine, therefore, applies." *Id.* The district court also held that the parties had entered into a valid arbitration agreement. *Id.* at 53a.

On appeal, the Fourth Circuit held that the district court had jurisdiction to compel arbitration. It explained that under Section 4, "a district court may issue an order compelling arbitration if the court would otherwise 'have jurisdiction under Title 28, in a civil action . . . *of the subject matter of a suit arising out of the controversy* between the parties.'" Pet. App. 7a (omission in original) (quoting 9 U.S.C. § 4). The court further noted that "Section 4 does not require a party actually to file suit regarding the underlying controversy; the FAA requires only that a party be aggrieved by another party's failure to arbitrate a controversy, 'the subject matter of which would fall within the jurisdiction of [the court], were an actual suit to arise out of the controversy.'" *Id.* (quoting *Reynolds & Reynolds Co.* v. *Image Software, Inc.*, 254 F. Supp. 2d 761, 765 (S.D. Ohio 2003)). Because "a § 4 petition to compel arbitration is properly in federal court if the underlying dispute presents a federal question," *id.* at 7a-8a, the Fourth Circuit held that it "must therefore look through the arbitration claim" and examine the dispute between the parties. *Id.* at 8a.

The court below addressed whether the parties' dispute (memorialized in petitioner's counterclaims) underlying the petition to compel arbitration was completely preempted by the FDIA. Pet. App. 11a. In assessing the question of "complete preemption" under the FDIA, the Fourth Circuit looked to *Beneficial National Bank*, 539 U.S. at 11 (2003), in which this Court addressed the issue of complete preemption "within the context of the National Bank

Act" ("NBA"). Pet. App. 20a.[3] The Fourth Circuit concluded that *Beneficial*'s analysis of complete preemption under Sections 85 and 86 of the NBA was equally applicable here because the NBA "is to national banks as section 27 of the FDIA is to state-chartered banks." *Id.*[4] Relying upon this Court's decision in *Beneficial*, the decisions of sister courts of appeals, the language of Section 27 of the FDIA, and the FDIC's *amicus* brief, the Fourth Circuit concluded that the FDIA completely preempted petitioner's state-law usury claims. *Id.* at 24a-25a.

SUMMARY OF ARGUMENT

The meaning of Section 4 of the FAA is plain and unambiguous. It grants federal courts jurisdiction to compel arbitration, but only if, after putting to one side the arbitration agreement, the court concludes that it "would have jurisdiction" over "a suit arising out of the controversy between the parties." 9 U.S.C.

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[3] The *Beneficial* Court held that "[b]ecause §§ 85 and 86 provide the exclusive cause of action" for usury claims, "there is . . . no such thing as a state-law claim of usury against a national bank." 539 U.S. at 11. As the court below explained, "even though the plaintiff's complaint [in *Beneficial*] did not mention federal law, [the] cause of action arose under federal law and defendant National Bank's removal to federal court based on complete preemption under the NBA was proper." Pet. App. 21a.

[4] The court of appeals also requested an amicus brief from the Federal Deposit Insurance Corporation ("FDIC") on the question whether Section 1831d "'completely preempts' state law usury claims." Pet. App. 24a. The FDIC opined that Discover Bank is the real party in interest and, as such, petitioner's counterclaims were completely preempted by federal law. *Id.* at 23a. The Fourth Circuit affirmed that conclusion, *id.*, and petitioner does not challenge this determination.

§ 4; *Moses H. Cone*, 460 U.S. at 25 n.32. In this case, it is undisputed that the underlying controversy over the legality of interest payments and other fees by Discover Bank was "completely preempted" and thus solely "based on federal law." Cf. *Beneficial Nat'l Bank*, 539 U.S. at 8. The district court thus properly exercised jurisdiction to compel arbitration in this case.

That conclusion follows from the language, structure and purpose of the FAA, each of which confirms that Congress adopted Section 4 to advance the federal policy in favor of private arbitration without expanding federal court jurisdiction to encompass each and every dispute involving an arbitration agreement within the scope of the FAA. The jurisdictional inquiry reflected in the text of Section 4 fits neatly within the structure of the FAA, and advances Congress's goals under the Act, through a process closely analogous to the inquiry under the Declaratory Judgment Act. See 28 U.S.C. § 2201; *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983).

In contrast, petitioner offers a tortured and implausible interpretation of Section 4 based largely upon a misreading of the legislative history leading to Congress's enactment of the FAA. Petitioner's argument cannot be reconciled with the language of the statute, and, if permitted, would severely undermine the utility of Section 4 as an independent means to enforce agreements to arbitrate, even though "[n]ormally, such motions are brought in independent proceedings." *Hartford Fin. Sys.*, 712 F.2d at 728 (Breyer, J.). Indeed, under petitioner's approach, a district court could not "look through" the petition and thus could not invoke diversity jurisdiction, even though this Court stated explicitly

that courts may do so. *Moses H. Cone*, 460 U.S. at 25 n.32. Such a reading would subvert the overarching purpose of the FAA: to ensure that agreements to arbitrate are enforced in accordance with their terms.

Second, the peculiar procedural posture of this case – that the parties' federal dispute first was revealed in a counterclaim filed in Maryland state court – should make no difference under Section 4 of the FAA. As petitioner acknowledges, Section 4 is designed to address the situation where a party neglects or refuses to arbitrate a dispute, including cases where no complaint has been filed at all. Pet. Br. 4. That petitioners' refusal to arbitrate was reflected in counterclaims filed in state court does not deprive the district court of jurisdiction to address Discover Bank's petition. As such, the judgment below in no way conflicts with this Court's ruling in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002).

Finally, this Court need not and should not address the new issue of "standing," which petitioner seeks to inject into this case now even though she did not raise that issue in the petition for certiorari. See Sup. Ct. R. 14.1(a). That question raises no jurisdictional issue, but merely presents the factbound issue whether the district court properly concluded that petitioner (i) has refused to arbitrate in a case where petitioner has denied the existence of an agreement to arbitrate, and (ii) has opposed arbitration for years in legal proceedings before the district court and court of appeals. Petitioner's argument is procedurally improper and substantively meritless.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO COMPEL ARBITRATION UNDER SECTION 4 OF THE FAA.

This case turns on the correct interpretation of the language of Section 4 of the FAA. "It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); accord *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). In assessing the statutory text, this Court "consider[s] not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), as well as "the provisions of the whole law" including "its object and policy," *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). Application of these principles confirms that the district court properly exercised jurisdiction to compel arbitration in this case.

A. The Language, Structure, And Purpose Of The FAA Support Jurisdiction To Compel Arbitration In This Case.

1. The plain language of Section 4 confirms that the district court had jurisdiction to compel arbitration of the parties' dispute.

Section 4 provides, in relevant part, as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, [i] save for such agreement, [ii] would have jurisdiction

> under title 28, in a civil action or in admiralty [iii] of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. By its plain terms, Section 4 requires the district court to make an assessment, (i) putting to one side the agreement to arbitrate, (ii) whether it would have had jurisdiction under Title 28, (iii) over a suit between the parties arising out of their underlying dispute.

First, the district court's jurisdictional assessment is made "save for" the arbitration agreement. "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 643 (2006); see also *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning."); *Barber* v. *Gonzales*, 347 U.S. 637, 641 (1954) ("[S]tatutory language should be interpreted whenever possible according to common usage."). The ordinary or common meaning of "save for" is "but for" or "except for." See *Webster's New International Dictionary of the English Language* 1885 (1923) (defining "save" as "Except, excepting, not including, leaving out"; synonym: "EXCEPT"); *Funk & Wagnall's New Standard Dictionary of the English Language* 2180 (1924) (defining "save" as "Not taking account of; unless; excepting"; synonym: "BUT"); 14 *Oxford English Dictionary* 528 (2d ed. 1989) (defining "save" as "Except, with the exception of, but" and "save for" as "exception being made for, but for"); Pet. App. 64a ("The common understanding of the phrase 'save for' means 'but for' or 'notwithstanding.'"). As such, Section 4 obligates the district court to put to

one side the parties' agreement to arbitrate when it considers the remaining requirements of Section 4.

Second, the district court must assess whether it "would have jurisdiction under title 28." The use of the subjunctive phrase "would have" reflects that the court must assess not the suit before it, but a potential suit. See *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 555, (1973) ("The use of the subjunctive indicates that Congress was concerned with the potential effects."). Further, the reference to "title 28" reflects that the assessment of jurisdiction is not cabined solely to a single basis, such as diversity jurisdiction, but encompasses more broadly all bases for jurisdiction reflected in Title 28. Pet. App. 65a.[5]

Third, and most significantly, Section 4 provides that the object of the court's jurisdictional assessment is "the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. As this Court has explained, this language requires the district court to assess whether it "would have jurisdiction over a suit on the underlying dispute." *Moses H. Cone*, 460 U.S. at 25 n.32; accord *Southland*, 465 U.S. at 15 n.9 (citing *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons, Inc.* 62 F.2d 1004, 1006 (2d Cir. 1933) (L. Hand, J.)).[6]

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[5] Under the original version of Section 4, jurisdiction to compel arbitration was based on whether the district court "would have jurisdiction" over a suit arising "under the judicial code at law, in equity, or in admiralty." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883, 883. That language confirms that Congress intended a variety of bases upon which the district court could ground its jurisdiction under Section 4.

[6] The *Krauss Brothers* decision issued by Judge Learned Hand and relied on in *Southland* is particularly instructive. There,

That straightforward reading of "controversy between the parties" is confirmed elsewhere in the FAA. For example, in Section 2, Congress twice uses the same word "controversy" to refer to the dispute "arising out of [the parties'] contract or transaction," and not the dispute about arbitrability. 9 U.S.C. § 2.[7] That fact is critical because "'identical words used in different parts of the same act are intended to have the same meaning.'" *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986)); see also *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction*

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the Second Circuit held that it had "no doubt that the District Court had jurisdiction over" an independent suit "specifically to enforce" arbitration under Section 4. 62 F.2d at 1005-06. The Court explained that the language of Section 4 was "entirely clear" and, applying that language, there was jurisdiction to compel arbitration because the parties' underlying dispute "involved an interstate shipment" and the parties "were citizens of different states." *Id.* at 1006.

[7] *See also* Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 Harv. Negot. L. Rev. 319, 344-45 (2007) ("Sections 2 and 4 should be construed together, and the term 'controversy' in both sections should be read consistently to mean the underlying dispute to be arbitrated."). This meaning is also consistent with the use of "controversy" in other sections of the FAA, which plainly reference the underlying dispute. 9 U.S.C. § 1 ("maritime transactions" include "agreements relating to . . . matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction"); *id.* § 5 ("upon the application of either party to the controversy the court shall designate and appoint an arbitrator"); *id.* § 10 (the court may vacate the award "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy"); *id.* § 11 (the court "may make an order modifying or correcting the award . . . [w]here the award is imperfect in matter of form not affecting the merits of the controversy").

Laborers Pension Trust, 508 U.S. 602, 634 (1993) (noting that the "usual presumption of statutory interpretation [is] that the same term carries the same meaning whenever it appears in the same Act").

Indeed, when read in proper context, the phrase "controversy between the parties" in Section 4 cannot refer to whether the agreement to arbitrate should be specifically performed, as petitioner proposes. Section 4 requires an assessment of jurisdiction "save for" the parties' agreement to arbitrate. 9 U.S.C. § 4. In the absence of an arbitration agreement, however, there could be no "controversy between the parties" over arbitrability.

Rather, under Section 4, a district court has jurisdiction to compel arbitration if, putting to one side the agreement to arbitrate, it would have subject matter jurisdiction to address on the merits a suit arising out of the underlying controversy between the parties. Because this meaning of Section 4 is evident from its plain language, the Court "need go no further." *Sullivan*, 496 U.S. at 482.

2. The same conclusion likewise follows from the structure of the FAA.

In both *Moses H. Cone* and *Southland*, this Court explained that, although the FAA creates "federal substantive law" of arbitrability, "it does not create any *independent* federal-question jurisdiction under 28 U.S.C. § 1331 . . . or otherwise." *Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 15 n.9 (emphasis added). This Court found that conclusion "implicit" in the jurisdictional language reflected in Sections 3 and 4 of the FAA. *Southland*, 465 U.S. at 15 n.9.

Under Section 3 of the FAA, a stay may be granted only "by a 'court in which such suit is pending.'" *Id.*

(quoting 9 U.S.C. § 3). Similarly, under Section 4, the court's jurisdiction to compel arbitration is dependent on whether the district court "'would have jurisdiction under title 28 . . . of the subject matter of a suit arising out of the controversy between the parties.'" *id.* (quoting 9 U.S.C. § 4). As such, in *Moses H. Cone*, the Court concluded that Section 4 thus expressly defines the circumstances under which the district court has jurisdiction to compel arbitration. 460 U.S. at 25 n.32.

Petitioner ignores *Moses H. Cone* and instead relies upon passing statements in this Court's decision in *Hall Street Associates* v. *Mattel* for the proposition that the FAA "'does nothing'" with respect to jurisdiction. Pet. Br. 6, 12. But the *Mattel* Court broke no new ground in this area; rather, it merely restated the abiding understanding reflected in *Moses H. Cone* and *Southland* that the FAA does not create "independent" jurisdiction. See *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (citing *Moses H. Cone*, 460 U.S. at 25 n.32).[8] That is, the FAA does not provide independent federal-question jurisdiction; rather, Section 4 provides for an order compelling arbitration "only when the federal district court would have jurisdiction over a suit on the underlying dispute." *Moses H. Cone*, 460 U.S. at 25 n.32.

That inquiry under Section 4 is similar to a district court's assessment of federal-question jurisdiction in a declaratory judgment action. For example, in

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[8] In *Mattel*, the parties' agreement to arbitrate was "entered into in the course of district-court litigation," 128 S. Ct. at 1407, and thus there was no need to compel arbitration or assess whether the court had jurisdiction to compel arbitration.

Franchise Tax Board v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court recognized that "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Id.* at 19; see also *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 248 (1952); 10B Charles Alan Wright, et al., *Federal Practice and Procedure* § 2767, at 655-58 (3d ed. 1998) ("[I]f the federal issue would inhere in the claim on the face of the complaint that would have been presented in a traditional damage or coercive action, then federal jurisdiction exists over the declaratory-judgment action."). Likewise, the federal courts of appeals apply the same standard for "arising under" jurisdiction in a declaratory judgment action, assessing "*whether federal question jurisdiction would exist* over the presumed suit by the declaratory judgment defendant." *GNB Battery Techs., Inc.* v. *Gould, Inc.*, 65 F.3d 615, 619 (7th Cir. 1995) (emphasis added).[9]

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[9] *See, e.g.*, *Household Bank* v. *JFS Group*, 320 F.3d 1249, 1259 (11th Cir. 2003) ("[A] federal district court has subject-matter jurisdiction over a declaratory judgment action if, as here, a plaintiff's well-pleaded complaint alleges facts demonstrating the defendant *could file* a coercive action arising under federal law." (emphasis added)); *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 95 F.3d 959, 964 (10th Cir. 1996) ("[F]ederal question jurisdiction exists in a declaratory judgment action if the potential suit by the declaratory judgment defendant would arise under federal law."); *TTEA* v. *Ysleta del Sur Pueblo*, 181 F.3d 676, 681 (5th Cir. 1999) ("To establish an independent basis for jurisdiction . . . the plaintiff need not show that it would state a claim absent the declaratory judgment statute. Rather, it may show that there would be jurisdiction over a claim against it.").

Petitioner rejects the analogy between Section 4 and the Declaratory Judgment Act, contending that unlike a declaratory judgment action, "neither the Section 4 petition nor the response to it asks the court to resolve any federal question and the court cannot reach the merits of the underlying dispute in which any federal question is embedded." Pet. Br. 20. But, in deciding a petition under Section 4, a court necessarily determines whether a party has been "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." 9 U.S.C. § 4. And there can be no question that in compelling arbitration under the FAA, a party seeks to vindicate its rights under a "federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 12 ("We thus read the underlying issue of arbitrability to be a question of substantive federal law").[10] To be sure, the district court does not also resolve the underlying dispute for which arbitration is sought, but that is necessarily the case under Section 4 where the relief sought is enforcement of a federal right to compel arbitration (rather than

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[10] Petitioner's reliance on *Textron Lycoming Reciprocating Engine Division* v. *UAW*, 523 U.S. 653 (1998), is likewise misplaced. Pet. Br. 19. The *Textron* Court simply noted that "[n]o decision of this Court has squarely confronted and explicitly upheld federal-question jurisdiction on the basis of the anticipated claim against which the declaratory-judgment plaintiff presents a nonfederal defense." 523 U.S. at 659-60. Here, Discover, like the declaratory judgment plaintiff, does have a federal substantive claim to relief (*see Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 12); moreover, petitioner's completely preempted underlying claim can only arise under federal law.

litigation) of the parties' dispute. See *Dean Witter Reynolds*, 470 U.S. at 219-20 (FAA's "overriding goal" is to send properly arbitrable disputes to arbitration).

Contrary to petitioner's suggestion, Pet. Br. 20, applying Section 4 in accordance with its terms does not effect a broad-based repeal of federal court jurisdiction under 28 U.S.C. § 1331. Instead, Section 4 provides a *dependent* grant of jurisdiction that authorizes a district court to compel arbitration when it determines that it would have jurisdiction over the parties' underlying dispute. Cf. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 267 (1926) ("The Federal courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would have had jurisdiction of an action or proceeding arising out of the controversy between the parties."). As such, the controlling presumption applicable to this dispute is that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); see *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not"); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

3. As this Court has noted, "we must not overlook [the FAA's] principle objective when construing the statute." *Dean Witter Reynolds*, 470 U.S. at 220. As such, Section 4 should be interpreted, consistent with its language, to further the FAA's "overriding goal" of

"ensur[ing] judicial enforcement of privately made agreements to arbitrate." *Id.* at 219.

In enacting the FAA, Congress sought to provide an effective means to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 465 U.S. at 22. At the same time, Congress did not seek to expand the jurisdiction of the district courts to encompass every arbitration agreement within the purview of the FAA. See *Southland*, 465 U.S. at 15 n.9; *Moses H. Cone*, 460 U.S. at 25 n.32. Thus, although the FAA creates "federal substantive law," it does not create federal jurisdiction to enforce every arbitration agreement within its scope. 460 U.S. at 25 n.32.

Through Section 4, Congress provided a federal court vehicle for the effective enforcement of agreements to arbitrate, even if there were no pending litigation in the district court. So long as a party is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" and the district "would have jurisdiction" over "a suit arising out of the controversy between the parties," the district court has the power and duty to compel arbitration. 9 U.S.C. § 4. In this way, Section 4 is an essential mechanism for advancing the FAA's goal of making arbitration agreements enforceable.

If the ability of the federal courts to enforce arbitration agreements were limited to situations in which a party had already filed a suit in the district court, the FAA's purpose of "mandat[ing] the enforcement of arbitration agreements," *Southland*, 465 U.S. at 10, would be significantly undermined. As petitioner acknowledges, Section 4 provides a mechanism for enforcing agreements to arbitrate

when there is "no such suit . . . pending in district court." Pet. Br. 4.

In light of the FAA's purpose, Section 4 is properly construed in a way that preserves its role as an effective means of providing a party aggrieved by "the alleged failure . . . of another to arbitrate," 9 U.S.C. § 4, to "enforce [the] private agreemen[t] into which [the] parties had entered," *Dean Witter Reynolds*, 470 U.S. at 221. Although state courts often are called on to enforce the FAA's obligations, the FAA is "to be vindicated by the federal courts where otherwise appropriate." *Moses H. Cone*, 460 U.S. at 25 n.32. Indeed, federal court jurisdiction is all the more critical where, as here, the parallel state court system has held that it is not bound by Section 4 of the FAA. *E.g.*, *Walther* v. *Sovereign Bank*, 872 A.2d 735, 742 (Md. 2005) ("state courts are not bound by . . . §§ 3 and 4 of the FAA"). As such, Discover Bank could exercise its rights under FAA Section 4 only in federal court.

An interpretation of Section 4 that prevents the district court from "looking through" the petition to the parties' underlying dispute, would both violate the language of Section 4 and subvert Congress's goals under the FAA. Petitioner acknowledges that Congress intended Section 4 to apply even when there is no prior suit "pending in district court." Pet. Br. 4. If, as petitioner contends, a district court could not ground jurisdiction on the parties' underlying dispute, the only cases in which it would be authorized to order independent relief would be cases where the obligation to arbitrate were based on some federal law separate and apart from the FAA. *Id.* at 29-30 (citing ERISA, "disputes between concessioners in national parks," and contracts affecting land "within the Gila River Indian Community" and the

"Salt River Pima-Maricopa Indian Reservation").[11] The Congress that enacted the FAA, however, plainly was not concerned with these obscure circumstances since the statutes cited by petitioner did not even exist when the FAA was enacted. Cf. *Allied-Bruce Terminix*, 513 U.S. at 280 (addressing interests of Congress when it enacted the FAA).

Nor does petitioner advance any basis why district courts may "look through" to the underlying controversy in assessing the amount in controversy in diversity cases, but may not do so in federal question cases. By its own logic, petitioner's view would exclude any diversity case from being brought in an independent action to compel arbitration under Section 4 because the amount in controversy requirement can only be met by reference to the parties' underlying dispute. Indeed, Congress enacted Section 4 because courts that had "enforce[ed]" agreements to arbitrate denied parties' the benefits of those agreements by "awarding nominal damages for breach of contract." Pet. Br. 22 (citing cases). As a result, the only way to establish diversity jurisdiction would be to look beyond the arbitrability question before the court and to the underlying dispute to be arbitrated.

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[11] Each of the statutes identified by petitioner was enacted well *after* the FAA. 29 U.S.C. § 1401 (1980); 16 U.S.C. § 5954 (1998); 25 U.S.C. § 415(f) (2002); 25 U.S.C. § 416a(c) (1983). Indeed, the ERISA statute and other statutes provide their own means for a party to seek arbitration of a dispute thereby making an appeal to Section 4 unnecessary. *See* 29 U.S.C. § 1401(a)(1) ("Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 . . . shall be resolved through arbitration."); *accord* 16 U.S.C. § 5954(b)(2); 25 U.S.C. §§ 415(f) & 416a(c).

There can be no doubt that Congress intended for diversity jurisdiction to serve as an independent basis for jurisdiction under Section 4. See *Moses H. Cone*, 460 U.S. at 25 n.32 ("[H]ence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue").[12] Even the courts of appeals that ostensibly refuse to "look through" to the substantive disputes underlying Section 4 arbitrability actions, see, *e.g.*, *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263, 267-68 (2d Cir. 1996), require courts to review the underlying dispute to determine whether the amount in controversy meets the jurisdictional minimum. See *Doctor's Assocs.*, 150 F.3d at 160-61.[13]

Neither these courts of appeals (*e.g.*, *Westmoreland*) nor petitioner offers any explanation for this disparity in treatment between diversity and federal-question jurisdiction, and the language of Section 4 supports none. See Szalai, *supra* at 362 (explaining that courts rejecting the look-through approach "do

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[12] The same is true of admiralty jurisdiction. In *The Anaconda*, this Court explained that Section 4 provides "for framing an issue and trying it as to whether the parties are bound to arbitrate" and makes "clear that the parties may proceed in an admiralty case without the customary libel and seizure." 322 U.S. at 45; *see Henderson* v. *United States*, 517 U.S. 654, 659 (1996) (explaining that a "libel" is a complaint at admiralty).

[13] Every court of appeals to have addressed the issue agrees that the amount in controversy must be assessed by looking to the underlying dispute to be arbitrated. *See, e.g.*, *Richard C. Young & Co.* v. *Leventhal*, 389 F.3d 1, 3 (1st Cir. 2004); *America's MoneyLine, Inc.* v. *Coleman*, 360 F.3d 782, 785-86 (7th Cir. 2004); *Smith Barney, Inc.* v. *Sarver*, 108 F.3d 92, 95 n.3 (6th Cir. 1997); *Jumara* v. *State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995).

an about-face" when it comes to diversity jurisdiction). Thus, if petitioner would forbid a court from looking through to the underlying dispute for purposes of establishing jurisdiction under 28 U.S.C. § 1331, then that logic would require the same result as to 28 U.S.C. § 1332. Such a result, however, would undermine the FAA's central goal of "ensur[ing] judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds*, 470 U.S. at 219.

As this Court has explained, in construing the FAA, it is necessary to be aware of the "practical consequences" of competing interpretations. *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 203-04 (2000). The "practical consequences" of the interpretation advanced by petitioner would be to render Section 4 meaningless in any independent action brought to compel arbitration.

B. Petitioner's Alternative Interpretation Of Section 4 Is Contrary To The Language, Structure, And Purpose Of The FAA.

Petitioner argues that Section 4 permits federal courts to review independent petitions to compel arbitration only where the dispute over arbitrability itself raises a federal question. Pet. Br. 29. Because this reading conflicts with the unambiguous language of Section 4, petitioner is forced to twist that language beyond recognition through a novel re-interpretation of the FAA's legislative history.

1. In violation of the settled maxim that the interpretation of a statutory provision "begin[s] with the text of the statute," *Limtiaco* v. *Camacho*, 127 S. Ct. 1413, 1418 (2007), petitioner studiously avoids the language of Section 4 and instead begins her analysis with a long discourse on the legislative

history leading up to the enactment of the FAA. Pet. Br. 21-27. That analysis should be rejected because it (i) cannot be reconciled with the plain language of Section 4 of the FAA, including both tne "save for" and "a suit arising" clauses; (ii) undermines the language of Section 3; and (iii) fails on its own terms.

First, petitioner's interpretation of the phrase "save for such agreement" is implausible. According to petitioner, Congress included that language in Section 4 to instruct a reviewing court that it was "no longer handcuffed by 'ouster'" and that it "possessed equitable jurisdiction to compel arbitration." Pet. Br. 26. Thus, according to petitioner, the phrase "'save for such agreement' instructs the court to ignore this outmoded rule in examining its jurisdiction."[14] That argument is plainly wrong.

The clearest indication that petitioner's interpretation is wrong is that Section 4 is the provision setting forth a district court's authority to compel arbitration where the parties have agreed to arbitrate. Section 4 explicitly directs courts to compel arbitration *only* when the right to arbitrate is not in issue. Given this direct command, it would be passing strange for Congress to include the "save for" clause in Section 4 based on a need to assure district courts that the existence of an agreement to arbitrate

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[14] The "ouster" problem referred to by petitioner is the unwillingness of pre-FAA courts specifically to enforce agreements to arbitrate due to their belief that parties could not, by contract, oust the courts of their jurisdiction. *See, e.g.*, *Perkins* v. *U.S. Elec. Light Co.*, 16 F. 513, 515 (2d Cir. 1881). This Court has recognized that the FAA "was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Volt Info. Scis.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

does not "oust" them of jurisdiction to compel arbitration of those agreements.

Moreover, petitioner's interpretation violates the fundamental canon that a statute should be read to convey its plain meaning, not a meaning that would require additional words to be added to the statutory text. See, *e.g.*, *Haynes* v. *United States*, 390 U.S. 85, 92 (1968) ("[I]f this was indeed Congress' purpose, it is difficult to see why it did not . . . insert the few additional words necessary to make clear its wishes."); *Kordel* v. *United States*, 335 U.S. 345, 350 (1948) ("[W]e see no reason for reading the additional words into the text."). Under petitioner's interpretation, when Congress said "save for such agreement" it really meant to say "save for [prior judicial unwillingness to enforce any] such agreement." See Pet. Br. 26 ("The phrase 'save for *such agreement*' instructs the court to ignore this outmoded *rule*" (emphases added)). The text of the statute simply does not support that reading. See *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 617 (1944) ("To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another.").

Petitioner's interpretation of the "save for" clause is likewise flawed because it would render "superfluous" and "insignificant" other parts of the FAA. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair Twp.* v. *Ramsdell*, 107 U.S. 147, 152 (1883))). Section 2 of the FAA makes agreements within the scope of the FAA "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

contract." 9 U.S.C. § 2. As such, Section 2, the FAA's "centerpiece provision," *Mitsubishi Motors Corp.*, 473 U.S. at 625, directly addresses judicial hostility based upon "ouster."

Petitioner's reading of the "save for" clause also is implausible because, if petitioner were correct, Congress would have required similar treatment of the "ouster" in other provisions such as Section 3 of the FAA. Section 3 provides that when a court enforces a valid arbitration agreement, it must "stay the trial of the action until such arbitration has been had," thereby allowing its jurisdiction to be "ousted." 9 U.S.C. § 3. Congress, however, saw no need to inform district courts that they had jurisdiction to stay their proceedings when the parties had entered into an agreement to arbitrate. See, *e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-21 (1991) (explaining that when language is included in one provision but not in its neighbor, it reflects a "deliberate" choice by Congress).

Finally, petitioner's reading of the "save for" clause fails on its own terms because her "effort to connect the 'save for' language to the ancient problem of 'ouster of jurisdiction' is imaginative, but utterly unfounded and historically inaccurate." 1 Ian R. Macneil et al., *Federal Arbitration Law* § 9.2.3, at 9:18 (1996) (footnote omitted). First, the FAA was modeled after state statutes that contained no such language, even though both were addressing the same judicial hostility to arbitration. See *infra* at 33.

Moreover, petitioner misstates Congress's understanding of the "ouster" doctrine when she argues that the "save for" clause was necessary to assure a court asked to enforce an arbitration agreement that it "'would not be divested by the arbitration agreement,'" and therefore "'may proceed

to order arbitration, contrary to prior precedent.'" Pet. Br. 26 (quoting *Drexel Burnham Lambert, Inc.* v. *Valenzuela Bock*, 696 F. Supp. 957, 962-63 (S.D.N.Y. 1988)). According to petitioner, Congress sought to assure courts that arbitration agreements did not divest them of their jurisdiction. This understanding of the "ouster" problem is unfounded.

Congress recognized that many courts accepted arbitration agreements as valid.[15] Congress was concerned, however, that courts nonetheless found arbitration agreements to be revocable at any time and unenforceable at equity, thereby barring the remedy of specific performance. See S. Rep. No. 68-536, at 2 (1924) ("But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity . . . . [T]he agreement was subject to revocation by either of the parties at any time before the award.").

Congress never expressed a concern that courts were refusing to review arbitration agreements because they thought they lacked jurisdiction to do so. Rather, it understood that the "ouster" problem involved the unwillingness of courts to enforce specifically arbitration agreements because the *effect* of specific enforcement would be to divest courts of their jurisdiction. See, *e.g.*, *Dean Witter Reynolds*, 470 U.S. at 220 n.6 ("[B]ecause of the jealousy of the

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[15] The Senate Report is explicit on this point: "It is not contended that agreements to arbitrate have no validity whatever. A party may be liable in an action for damages for the breach of an executory agreement to arbitrate; or . . . the appropriate action may be brought at law or in equity to enforce the award. *Both maritime contracts or transactions and contracts involving interstate commerce are at least valid to this extent.*" S. Rep. No. 68-536, at 2 (1924) (emphasis added).

English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were *thereby* ousted from their jurisdiction." (quoting H.R. Rep. No. 68-96 1-2 (emphasis added)); *U.S. Asphalt Ref. Co.* v. *Trinidad Lake Petroleum Co.*, 222 F. 1006, 1011-12 (S.D.N.Y. 1915) (holding that the court will not enforce an arbitration agreement that is "*intended* to oust the courts and all courts of their jurisdiction" (emphasis added)).

This correct understanding of the "ouster" problem also confirms that the "save for" language in Section 4 is not superfluous, Pet. Br 33, but was included by Congress to address the jurisdictional issue created by FAA Section 2, which makes arbitration agreements "valid, irrevocable, and enforceable." 9 U.S.C. § 2. As a result of Section 2, courts are without jurisdiction to decide the parties' *underlying dispute* if the parties agreed to arbitrate. See, *e.g.*, *Preston* v. *Ferrer*, 128 S. Ct. 978, 981 (2008). As such, the phrase "save for such agreement" requires the district court to assess its jurisdiction over a potential suit on the parties' *underlying dispute* without regard to the effect that the arbitration agreement would have on the court's jurisdictional analysis under the FAA.

Second, and equally misguided, is petitioner's interpretation of the jurisdictional language of Section 4. Petitioner suggests that the language "would have jurisdiction" of "a suit arising out of the controversy between the parties" in Section 4 means a "traditional suit seeking specific performance of a contract." Pet. Br. 36. Of course, the only "contract" for which anything resembling "specific performance" is sought under Section 4 is the parties' agreement to arbitrate.

Petitioner's interpretation of this language would render Section 4 nonsensical. Cf. *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988) ("[C]ourts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading."). As explained above, the "save for" clause in Section 4 instructs courts to put to one side the arbitration agreement when making the jurisdictional determination mandated by Section 4. If the controversy in question were, as petitioner argues, the controversy about whether to enforce the contract to arbitrate, then Section 4 would make no sense because without the contract to arbitrate itself, there could be nothing to enforce.[16]

Further, petitioner's interpretation is inconsistent with the original language of Section 4, which provided that courts were to determine whether they "would have" jurisdiction over such suits "under the judicial code at law, in equity, or in admiralty." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883, 883. Petitioner acknowledges that Congress's adoption of the current language was not meant to change the substantive meaning of Section 4, Pet. Br. 31, but the original language confirms that Congress contemplated that a court examining its jurisdiction over such a suit would look to its jurisdiction "at law, in

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[16] As noted, this Court already has stated that "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the *underlying dispute*." *See Moses H. Cone*, 460 U.S. at 25 n.32 (emphasis added)); *id.* at 20-21 (contrasting litigation over "arbitrability" with litigation over the "merits of the underlying disputes").

equity or in admiralty." Act of Feb. 12, 1925, at 883. Under petitioner's interpretation of Section 4, however, a court never would have had jurisdiction at law, since a "traditional suit seeking specific performance of a contract" was established as a suit at equity. See, *e.g.*, *Union Pac. Ry.* v. *Chicago, Rock Island & Pac. Ry.*, 163 U.S. 564, 600 (1896) ("The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law."); *United States Mut. Accident Ass'n* v. *Barry*, 131 U.S. 100, 122 (1889) ("[T]he remedy of the plaintiff was solely in equity, for a specific performance of the contract.").[17]

Petitioner argues that Congress added this language to the New York and New Jersey state codes upon which the FAA was modeled because the federal system, unlike the state systems, had not yet merged its procedures for law and equity. Pet. Br. at 24 & n.3. That is wrong. New Jersey maintained separate courts for law and equity until 1947, and it still requires that parties seeking primarily equitable relief bring actions in the Chancery Division of the Superior Court, which is distinct from the court's Law Division. See N.J. R. of Ct. 4:3-1; *Lyn-Anna Props.*,

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[17] Indeed, as petitioner acknowledges, Pet. Br. 36, Section 4 creates a *statutory* right to compel arbitration that "supplant[s]" the old suits at equity. *Id.* Under Section 4, courts are instructed to use a particular set of procedures set forth in the statute. Among those procedures is the right to a jury trial, a right that was required in suits at law but unavailable in suits at equity. *See, e.g.*, *Furrer* v. *Ferris*, 145 U.S. 132, 134 (1892) ("[I]t is evident that the petitioner preferred to not exercise his right to a common-law action and a trial by a jury, but rather to come into a court of equity and have his rights there determined according to the rules and practice of such courts.").

Ltd. v. *Harborview Dev. Corp.*, 678 A.2d 683, 689-91 (N.J. 1996) (discussing history).[18]

Nor was this jurisdictional language necessary to explain the procedures of Section 4 by means of an "analogy" to federal equity suits. Pet. Br. 24-25, 27. The procedures of Section 4 are not complicated, and are expressly set forth in the text of the remainder of Section 4. 9 U.S.C. § 4. Indeed, petitioner herself cites the legislative history to explain that the new procedures were meant to be "'very simple, following the lines of ordinary motion procedure.'" Pet. Br. 23 (quoting H.R. Rep. No. 68-96, at 2). Petitioner's reading of the jurisdictional language of Section 4 would have had the perverse effect of *confusing* the courts, since it would have forced them to draw an "analogy" to their equitable jurisdiction even though Section 4 sets out the specific procedures to be followed – including provisions for jury trials, which are unavailable at equity.[19]

2. Petitioner's reading of Section 4 also cannot be reconciled with the structure of the FAA. Petitioner argues that this Court's statement that the FAA

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[18] Further, when the New York legislature enacted its arbitration law in 1920, it had just as much need as Congress did to assure courts that they could compel arbitration. Even though New York established unified procedures in 1848, New York courts continued to enforce the rule that the equitable remedy of specific performance was unavailable to parties aggrieved by another's failure to arbitrate. *See, e.g.*, *Smith* v. *Rector of St. Philip's Church*, 14 N.E. 825, 829 (N.Y. 1888); *Van Beuren* v. *Wotherspoon*, 42 N.Y.S. 404, 410 (N.Y. App. Div. 1896).

[19] When the FAA was adopted, a party in federal court was obligated to choose between an action at law and an action at equity. *E.g. Buzard* v. *Houston*, 119 U.S. 347, 351-53 (1886).

"does not create any independent federal-question jurisdiction," *Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 15 n.9, prohibits federal courts from compelling arbitration under Section 4 even when the parties' underlying controversy would support federal court jurisdiction. Pet. Br. 18. But that conclusion misreads this Court's analysis of the structure of the FAA.

Specifically, this Court derived its conclusion that the FAA created no "independent" federal jurisdiction based upon an analysis of Sections 3 and 4 of the FAA. In *Moses H. Cone*, this Court looked to the limitation in Section 4 that a district court only has jurisdiction to compel arbitration when it "would have jurisdiction over a suit on the underlying dispute" and the limitation of Section 3 that a federal court "cannot stay a suit pending before it unless there is such a suit in existence." 460 U.S. at 25 n.32. Likewise, in *Southland*, this Court explained that its conclusion that the FAA creates no "independent federal-question jurisdiction under § 1331 ... or otherwise" was "implicit in the provisions in § 3 for a stay by a 'court in which such suit is pending' and in § 4 that enforcement may be ordered by 'any United States district court which, save for such agreement, would have jurisdiction under title 28." 465 U.S. at 15 n.9. Thus, the Court's *general* conclusion that the FAA creates no "independent" federal jurisdiction was based upon the Court's *specific* analysis of the jurisdictional language of Section 4.[20]

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[20] Petitioner exacerbates her error when she argues that 9 U.S.C. §§ 7, 9, 10, and 11 all require an "independent" basis for federal jurisdiction that does not involve a court "looking-through" to the underlying dispute. Pet. Br. 40-41. That argument ignores (i) the textual differences between Section 4

Nor does petitioner's position find any support in Chapter 2 of the FAA, which provides for the enforcement of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). In Sections 203 and 205, the jurisdictional provisions of Chapter 2, Congress authorized the federal courts to exercise independent federal-question jurisdiction over all arbitration disputes covered under the Convention. See 9 U.S.C. §§ 203, 205. That broad grant of independent jurisdiction reflected in the Convention is tempered by the fact that the Convention itself applies to a much narrower swath of arbitration disputes – only those involving cross-border controversies. See *id.* § 202. In contrast, the FAA applies generally to all commercial arbitration disputes, to the fullest extent of Congress's commerce power. See *id.* § 2; *Allied-Bruce Terminix*, 513 U.S. at 277. Congress's decision to expand the jurisdictional reach of the Convention does not limit the express jurisdictional reach of Section 4 of the FAA.

3. Finally, petitioner's reading of the FAA is contrary to the purpose of the FAA. Specifically, petitioner ignores that the overarching goal of the statute is to provide a mechanism through which parties can ensure the enforceability of agreements to arbitrate in accordance with their terms. See *Allied-Bruce Terminix* , 513 U.S. at 270; *Volt Info. Scis.*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private

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and these other sections, and (ii) that the "independent" jurisdiction requirement reflected *Moses H. Cone* derives directly from this Court's analysis of text of Section 4.

agreements to arbitrate.").[21] In the name of avoiding the complexity that may arise when courts are required to assess subject matter jurisdiction, petitioner adopts an interpretation that would render Section 4 virtually meaningless as a mechanism for seeking independent enforcement of agreements to arbitrate in federal court.

By its terms, Section 4 offers relief where a party is aggrieved by the "failure, neglect, or refusal of another to arbitrate." 9 U.S.C. § 4. Congress thus recognized that parties would require orders to compel arbitration even if a lawsuit were not already pending in district court – for instance, where an opponent merely refuses to arbitrate a claim subject to arbitration without filing suit. Petitioner acknowledges this as well. Pet. Br. 4.

Petitioner's interpretation of Section 4, however, precludes jurisdiction based upon a "look-through" approach and authorizes jurisdiction only where the underlying agreement to arbitrate is a creation of federal law. *Id.* at 29. That interpretation would eliminate federal-question jurisdiction as a basis for an independent suit to compel arbitration. Further, that interpretation also would eliminate diversity as an independent basis for jurisdiction, since a court must be able to establish that the amount in controversy is greater than the jurisdictional minimum, see 28 U.S.C. § 1332, and that inquiry

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[21] Petitioner notes the FAA "'make[s] arbitration agreements as enforceable as other contracts, *but not more so*.'" Pet. Br. 42 (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)). This observation reflects an analysis of of "saving clause" of FAA Section 2, and is irrelevant here as petitioner does not contend her arbitration agreement may be revoked.

requires an analysis of the parties' underlying dispute. See *supra* 24-25.[22]

Because it eliminates federal-question and diversity jurisdiction as potential independent bases for jurisdiction, petitioner's interpretation would trivialize Section 4. Pet. Br. 29-30. Here, the denial of a federal forum would leave Discover Bank with no means to vindicate its federal right to compel arbitration under Section 4 because courts in many states – including Maryland – have held that Section 4 is not binding on them. See, *e.g.*, *Walther* v. *Sovereign Bank*, 872 A.2d 735, 742 (Md. 2005); *St. Fleur* v. *WPI Cable Sys./Mutron*, 879 N.E.2d 27, 32 (Mass. 2008); *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005).[23]

Lastly, petitioner is mistaken in suggesting that her interpretation furthers the goals of the FAA because it reduces the complexity and thus the delay sometimes associated with a district court's determination whether the parties' underlying dispute would support federal jurisdiction. Pet. Br.

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[22] Nor can petitioner avoid this fundamental problem with her approach by arguing that a Section 4 petitioner can plead the underlying amount in controversy in its petition to compel arbitration. If it could, then a Section 4 petitioner likewise would be able to plead the underlying federal question in its motion to compel arbitration. JA 30.

[23] Further, the scope of state-law arbitration statutes is not coextensive with the protections afforded by the FAA, and certainly was not in 1925. *Compare* Md. Code Ann., Ct. & Jud. Proc. § 3-206 (Maryland Act presumptively does not apply "to an arbitration agreement between employers and employees"), *with Circuit City Stores*, 532 U.S. at 109 (save for transportation workers, the FAA applies to arbitration agreements in employment contracts within the FAA's coverage).

41-45. That examination of the parties' underlying dispute, however, is little different than the analysis already conducted by a district court, which, under Section 4 must assess whether the underlying dispute falls within the scope of the FAA and the parties' arbitration agreement.

In any event, petitioner's *solution* to this complexity, is to render Section 4 dead letter. Without question, that would be more efficient, but only at the expense of the FAA's primary goal to promote arbitration. As this Court has explained, the "preeminent concern of Congress" was "to ensure judicial enforcement of privately made agreements to arbitrate" even if enforcement would not, in individual cases, "promote the expeditious resolution of claims." *Dean Witter Reynolds*, 470 U.S. at 219; *Volt Info. Scis.*, 489 U.S. at 478 ("While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'" (citing *Dean Witter Reynolds*, 470 U.S. at 220)); *Moses H. Cone*, 460 U.S. at 20 (the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement").

As such, petitioner's refusal to abide by the plain meaning of the jurisdictional language in Section 4 is directly contradicted by the FAA's goal to ensure the enforcement of private agreements to arbitrate.

II. THE DISTRICT COURT'S ORDER COMPELLING ARBITRATION DOES NOT CONTRAVENE THIS COURT'S DECISION IN *HOLMES GROUP*.

Petitioner also is wrong in arguing that the district court's exercise of jurisdiction under Section 4 of the FAA violates *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002). Specifically, petitioner contends that, under the "well-pleaded complaint rule," "[e]ven if Section 4 were to allow look-through jurisdiction," a federal court "hearing a Section 4 petition . . . cannot ground federal question jurisdiction in . . . a completely preempted state-law counterclaim, in a suit pending in state court." Pet. Br. 46. That argument ignores the language of Section 4.

As noted above, under Section 4, a court may compel arbitration where a party has been aggrieved by the failure, neglect or refusal of another party to arbitrate, and save for the parties' agreement to arbitrate, a district court would have jurisdiction of a suit over the parties' underlying controversy. Here, the district court properly determined that petitioner had refused to arbitrate a dispute covered by the parties' agreement to arbitrate and that it "would have jurisdiction under title 28, in a civil action . . . of the subject matter of a suit arising out the controversy between the parties," 9 U.S.C. § 4; Pet. App. 48a-53a, 80a. Nothing in *Holmes Group* remotely undermines that result.

The issue before the Court in *Holmes Group* was whether the Federal Circuit had appellate jurisdiction over a case in which a patent law claim was only presented in the defendant's counterclaim. 535 U.S. at 827. This Court noted that the Federal

Circuit's jurisdiction was limited to cases that arise under federal patent law, and further explained that for an action to arise under federal patent law, a patent claim must be part of the plaintiff's well-pleaded complaint. *Id.* at 829-30. This Court held that the Federal Circuit lacked jurisdiction over the appeal because the patent-law counterclaim was not part of the plaintiff's well-pleaded complaint. *Id.*[24]

Holmes Group does not purport to say anything about a district court's jurisdiction to compel arbitration under Section 4 of the FAA. By its terms, Section 4 provides a federal right to compel arbitration of a dispute covered by the FAA where the opposing party has refused to arbitrate. As such, the applicability of Section 4 does not turn on the pendency of an existing lawsuit in federal or state court. Petitioner errs in attempting to extend *Holmes Group* to this case by suggesting that there is no jurisdiction to compel arbitration under Section 4 because it is only petitioner's completely preempted state-court *counterclaims* that support federal-question jurisdiction. Pet. Br. 46. Petitioner argues that, under the well-pleaded complaint rule, causes of action advanced in state-court counterclaims cannot provide a basis to compel arbitration under Section 4. *Id.* That argument cannot be reconciled with the language and purpose of Section 4.

1. By its terms, jurisdiction under Section 4 does not depend upon the pendency of any lawsuit.

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[24] The *Holmes Group* Court based its holding on some of the policies undergirding the well-pleaded complaint rule, namely (1) maintaining the complainant's right to choose the forum; (2) not expanding removal jurisdiction; and (3) maintaining the well-pleaded complaint rule as an easy-to-administer "quick rule of thumb." 535 U.S. at 831-32.

Rather, the plain language of Section 4 provides that a district court may compel arbitration whenever there is an alleged "failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" if the court "*would have* jurisdiction" over "*a suit* arising out of the controversy between the parties." 9 U.S.C. § 4 (emphasis added); see also *Moses H. Cone*, 460 U.S. at 25 n.32 (Section 4 permits an order to compel arbitration to issue when "federal district court would have jurisdiction over a suit on the underlying dispute"). Thus, as petitioner admits, Section 4 provides a mechanism to compel arbitration even when no "suit is pending in district court." Pet. Br. 4.

A contrary rule – one that required pending litigation before Section 4 could be employed – would undermine the core purpose of Section 4 because the federal right to compel arbitration could be thwarted by a party who simply refuses to arbitrate a dispute without ever filing a lawsuit in state or federal court. Cf. 9 U.S.C. § 5 (providing mechanism for choosing an arbitrator where a party has failed to "avail himself" of the method set forth in the arbitration agreement). Indeed, this Court and the courts of appeals have long understood that Section 4 petitions may be brought completely independent of any other pending proceeding. These so-called "independent" proceedings, "in which a request to order arbitration is the sole issue before the court," are distinguished from "embedded" proceedings, which involve "both a request for arbitration and other claims for relief." See *Green Tree Fin. Corp.*, 531 U.S. at 87 & n.3 (citing cases); cf. *Moses H. Cone*, 460 U.S. at 22 (Sections 3 and 4 are "parallel devices for enforcing an arbitration agreement").

Thus, in an independent proceeding, the language of Section 4 directs the district court to assess whether it "would have jurisdiction" over a hypothetical suit between the parties. Here, the completely preempted counterclaims advanced in the pending Maryland state court action confirm (i) the existence of a dispute between the parties that is subject to arbitration in accordance with their agreement, and (ii) that this dispute is one over which a district court would have jurisdiction in "a suit arising out of the controversy between the parties." 9 U.S.C. § 4. Under Section 4 it does not matter whether the dispute between the parties is actually embodied in a formal complaint, a counterclaim, or in no suit at all. The fact that the substance of the parties' controversy is reflected in a Maryland counterclaim is simply irrelevant to whether there is jurisdiction under Section 4.

Put another way, Discover Bank's federal right to compel arbitration under Section 4 is not contingent on whether petitioner decided to memorialize her dispute with Discover Bank in a Maryland state court counterclaim. The procedural posture of the pending Maryland state-court action here – in which Discover brought a simple recovery action against Petitioner, who then brought completely preempted counterclaims – does not deprive Discover of its federal right to have those claims arbitrated consistent with the parties' agreement. Under Section 4, as long as there has been a refusal to arbitrate and the district court "would have jurisdiction" over a potential suit that could be brought on the underlying dispute, Section 4 may be invoked to compel arbitration.

Nor does the discussion of removal jurisdiction in *Holmes Group* have any bearing on the issue before the Court. A district court's jurisdiction under

Section 4 is not coextensive with a court's removal jurisdiction over an existing state-court suit. Rather, before a district court may compel arbitration under Section 4, it must assure itself that, "save for" the agreement to arbitrate, it "*would have jurisdiction* under title 28" over "a suit arising out of the controversy between the parties." 9 U.S.C. § 4 (emphasis added). The removal statute, by contrast, limits removal to "any civil action *brought in a State court* of which the district courts of the United States *have original jurisdiction*." 28 U.S.C. § 1441 (emphasis added). Unlike Section 4, the removal statute requires an existing suit in state court, and also requires the district court to assess if it "ha[s] original jurisdiction" of that existing state-court suit, as opposed to determining if it "would have jurisdiction" over a potential suit. If Congress had intended to make the district court's jurisdiction under Section 4 identical to its removal jurisdiction – and thus dependent on a pending state-court suit – it easily could have done so, but wisely chose not to.

Removal jurisdiction was well established when Congress enacted the FAA in 1925, and therefore Congress could have explicitly tied the jurisdictional inquiry in Section 4 to the district court's removal jurisdiction, but it did not. See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option."). Instead, it chose to give the district court power to compel arbitration even when no lawsuit was pending if it "would have jurisdiction" over a potential suit arising out of the parties' underlying dispute.

2. The state court complaint brought by Discover is not the suit to which the district court would look

to assess its jurisdiction. Rather, the inquiry a court must make under Section 4 is whether it "would have jurisdiction" over "a suit arising out of the controversy between the parties," 9 U.S.C. § 4. In other words, upon receiving an independent petition to compel arbitration, the district court must determine which claims the plaintiff alleges should be arbitrated and whether the court would have jurisdiction over a suit brought by the defendant raising those claims.

In this case, Discover seeks to arbitrate petitioner's claims challenging the interest, fees and penalties for which petitioner is responsible under the parties' agreement. Petitioner does not dispute that these claims are completely preempted by federal law, and therefore "even if pleaded in terms of state law, [are] in reality based on federal law." *Beneficial Nat'l Bank*, 539 U.S. at 8. These are the claims specifically identified by Discover in its Section 4 petition as those which it seeks to arbitrate, see JA 29-30, and thus a suit raising these claims satisfies the jurisdictional requirement of Section 4.

Moreover, contrary to petitioner's contention, application of the plain language of Section 4 is entirely consistent with the well-pleaded complaint rule. Pursuant to Section 4, the district court must satisfy itself that a suit raising the claims sought to be arbitrated would properly come within that court's jurisdiction. This is similar to the inquiry in a declaratory judgment action, in which a potential coercive action by the declaratory judgment defendant must satisfy the well-pleaded complaint rule. See *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339

U.S. 667, 672 (1950).[25] A similar application of the well-pleaded complaint rule operates in the context of Section 4.

Nor does application of Section 4 do violence to the goals of the well-pleaded complaint rule identified by the Court in *Holmes Group*, 535 U.S. at 831-32. First, as the court below acknowledged, because Discover is the plaintiff in the state-court proceeding, there is no danger of depriving Discover (the master of the state court complaint) of its chosen forum. And this is not, moreover, a case of one party "opportunistically switch[ing] courts," as petitioner suggests. Pet. Br. 50. Instead, Discover is asserting a federal right to compel arbitration under Section 4, which it cannot assert in Maryland state court. Second, this case also poses no threat to the expansion of removal jurisdiction for the simple reason that it does not involve an issue of removal jurisdiction at all.

Finally, with the correct understanding of the suit to which the district court looks to determine its jurisdiction, the application of the well-pleaded complaint rule is no more difficult to administer than in a declaratory judgment action. Thus, the well-pleaded complaint rule can continue to serve as a "quick rule of thumb" for the district court to assess whether it would have jurisdiction over a suit raising

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[25] *See, e.g.*, *Franchise Tax Bd.*, 463 U.S. at 19; *Fina Oil & Chem. Co.* v. *Ewen*, 123 F.3d 1466, 1470 (Fed. Cir. 1997) ("We determine whether there is jurisdiction in a declaratory judgment action by applying the well-pleaded complaint rule. We apply that rule not to the declaratory judgment complaint but to the hypothetical action the declaratory defendant would have brought." (citation omitted)); *Cardtoons*, 95 F.3d 959 at (same). *See also supra* note 9 (citing cases).

the claims to be arbitrated. *Holmes Group*, 535 U.S. at 832.

Here, there can be no question that the district court in this case would have "arising under" jurisdiction over that suit and thus the power to compel arbitration under Section 4. Indeed, petitioner nowhere disputes – and did not present the question here – that there is federal-question jurisdiction over her claims of illegal finance charges, interest, and late fees. On that issue, the court below properly held that "the FDIA completely preempts state-court usury claims against a state-chartered, federally insured bank" and thus that "a federal question exists here." Pet. App. 4a, 28a.[26] That ruling in no way conflicts with *Holmes Group*.

III. PETITIONER'S "STANDING" ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND IS MERITLESS.

In the last pages of her brief, petitioner presents an "alternative" argument that Discover's motion to compel arbitration must fail because, despite petitioner's consistent refusal to arbitrate throughout the course of this years-long dispute, Discover is not "a party aggrieved" by her "failure, neglect, or refusal" to arbitrate within the meaning of Section 4. Pet. Br. 52-56. That argument should be rejected.

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[26] Petitioner does not challenge here the district court and Fourth Circuit's factual determinations that Discover Bank is the real party in interest. Pet. App. 12a-18a; *see Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (noting this Court's "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred").

First, and foremost, this argument is not fairly included in the questions presented in the petition and is thus not properly before this Court. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Irvine* v. *California*, 347 U.S. 128, 129 (1954) (Jackson, J.) (plurality opinion) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari."). Petitioner did not raise this "standing" issue in her petition for certiorari, and, consequently, this Court should decline to address it now.

Indeed, allowing petitioner to raise this new issue now that certiorari has been granted would undermine "the integrity of the process of certiorari." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992). Petitioner does not contend that there is any conflict among the lower courts on the question of whether, assuming that there is subject matter jurisdiction, the statutory requirements of Section 4 have been satisfied in this case. As such, petitioner made a strategic decision to omit any mention of this "standing" issue in her petition because that would have undermined petitioner's argument that this case presents an appropriate vehicle to resolve the questions that the Court granted certiorari to review. That is, petitioner should not be permitted to contend in her petition that this case squarely presents issues worthy of this Court's review, and then, after certiorari is granted, attempt to smuggle additional issues that have generated no conflicts among the lower courts and that reflect nothing more than routine applications of law to the particular facts in this case. See *City of Okla. City* v. *Tuttle*, 471 U.S. 808, 816 (1985) ("Our decision to grant certiorari represents a commitment of scarce judicial resources

with a view to deciding the merits of one or more of the questions presented in the petition."); *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("As a general rule, furthermore, we do not decide issues outside the questions presented by the petition for certiorari.").

Nor can petitioner sidestep these procedural hurdles by recasting the trial court's assessment of whether Discover had satisfied the substantive requirements of Section 4 as an issue of Article III standing. To the contrary, petitioner's challenge raises an issue of contract construction and statutory interpretation, which this Court need not and should not address. See *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[W]hen the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim."); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."); *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.").

Article III imposes minimum requirements on statutory grants of standing, see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 576 (1992), and Congress may, by legislation, confer standing up to the full extent permitted by Article III. See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). Petitioner does not contend that Congress exceeded the limits of Article III when it authorized district courts to compel

arbitration of disputes upon a showing that a party shows that it was "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement to arbitrate." 9 U.S.C. § 4. Instead, she argues that Discover's motion to compel arbitration should have been denied because "Discover filed its Section 4 petition in federal court when Ms. Vaden was not even arguably in breach of the (alleged) arbitration agreement." Pet. Brief 52. That argument raises no Article III issue but instead raises only the question whether the district court and court of appeals properly applied the statutory requirements of Section 4 to the facts in this case.

Here, the court of appeals properly rejected petitioner's claim that the requirements of Section 4 were not satisfied. As the court of appeals explained, petitioner's failure to abide by her obligation to arbitrate was manifest in her filing a counterclaim in state court and her continuing refusal to arbitrate for years during the pendency of this action. Pet. App. 27a n.20. Specifically, as the court below explained, "[t]o agree with Vaden's arguments that she has not refused a request for arbitration in the meaning of [Section 4] would create an absurd result: reversing a motion to compel arbitration against a party who argues that she never refused to arbitrate in the first place." *Id.*

To be clear, petitioner does not dispute that she has refused to arbitrate in accordance with the parties' arbitration agreement. Indeed, even now she contends that there is no such agreement. As such, the court of appeals properly recognized that a party who maintains litigation over a dispute subject to an arbitration agreement "fail[s], neglect[s], or refus[es]" to arbitrate that dispute. Pet. App. 27a n.20 (citing *PaineWebber, Inc.* v. *Faragalli*, 61 F.3d 1063, 1066

(3d Cir. 1995)), for the proposition that "an action to compel arbitration is proper when the other party refuses to arbitrate by 'unambiguously manifesting an intention not to arbitrate the subject matter of the dispute'"); see also *Downing* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 725 F.2d 192, 195 (2d Cir. 1984) ("Unless Merrill Lynch *commences litigation* or is ordered to arbitrate this dispute . . . and fails to do so, it is not in default of any arbitration agreement . . . ." (emphasis added)).[27]

Petitioner seeks to avoid the consequences of her refusal by establishing that under the parties' agreement, she had a right to file suit. Pet. Br. 52-3. Her right to maintain that suit, however, terminated the moment Discover elected to settle the dispute through arbitration. See JA 35 ("IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT . . . ."). Petitioner cannot seriously contend that Discover was not aggrieved by

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[27] Petitioner cites cases to establish a point that is not in contention – that Section 4 requires a party to be aggrieved by the failure, neglect, or refusal of another to arbitrate. Pet. Br. 53-54. The question before the courts below was whether petitioner's conduct in this case satisfies this requirement, and the cases cited by petitioner simply do not address that issue. *See Faragalli*, 61 F.3d at 1067-68 (assuming that a party *does* refuse to arbitrate when she maintains litigation subject to the parties' arbitration agreement). Likewise, the other cases cited by petitioner are inapposite because they did not address whether litigating claims subject to arbitration constitutes a failure, neglect, or refusal. *See Reconstruction Fin. Corp.* v. *Harrisons & Crosfield*, 204 F.2d 366, 369 (2d Cir. 1953); *Hanes Corp.* v. *Millard*, 531 F.2d 585, 600 n.12 (D.C. Cir. 1976), *superseded on other grounds by statute*, 35 U.S.C. § 294, *as stated in National R.R. Passenger Corp.* v. *Consolidated Rail Corp.*, 892 F.2d 1066 (D.C. Cir. 1990).

its status as an unwilling party to litigation over a dispute that it had elected to arbitrate. The statutory question of whether Section 4 creates a pre-filing notification requirement is an issue not properly presented in this case.

Indeed, petitioner's refusal to arbitrate was confirmed in her answer to the petition to compel arbitration. See JA 54 ¶¶ 36, 38 (denying (i) the "existence of an arbitration agreement" and (ii) that Discover is "entitled to any relief whatsoever"). Cf. *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 64 (1996) (holding that a district court's error in failing to remand a case improperly removed due to incomplete diversity at the time of removal does not void the judgment if federal jurisdictional requirements are met at the time judgment is entered). Consequently, every entry of judgment in this case occurred at a time when petitioner had already refused, on the record, to arbitrate.[28]

For years, petitioner has been locked in a live controversy with Discover about whether the underlying dispute between these parties is arbitrable. The notion that Discover Bank is not aggrieved and has suffered no injury within the meaning of Section 4 of the FAA plainly is meritless and reveals just how little confidence petitioner has in the Section 4 issues she actually presented for certiorari.

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[28] Even under Article III, "the injury required for standing need not be actualized" at the commencement of the action, so long as the party is threatened by injury that is "real, immediate, and direct." *Davis* v. *FEC*, 128 S. Ct. 2759, 2769 (2008). Although "the proof required to establish standing increases as the suit proceeds," *id.*, here, petitioner's refusal to arbitrate is undeniable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. RESPONDENTS DO NOT AND CANNOT ESTABLISH JURISDICTION UNDER SECTION 1331

One scours respondents' brief in vain for an answer to the fundamental question of why this action "aris[es] under" federal law? 28 U.S.C. § 1331. This is no small technical matter. The jurisdiction of federal district courts is "not self-executing," *Merrell Dow Pharm.* v. *Thompson*, 478 U.S. 804, 807 (1986), and respondents (Discover), like any other party asserting jurisdiction, bear the burden of overcoming the "presum[ption] that a cause lies outside [the] limited jurisdiction" Congress has provided, *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). As petitioner explained, Pet. Br. 17, the only legal obligation Discover asked the district court to enforce arose under state contract law. The district court was not asked to—indeed, it was not permitted to—decide the ostensibly "federal" usury question Ms. Vaden had raised as a counterclaim in the state court suit.

The closest Discover comes to identifying the particular federal question on which jurisdiction rests is when it points to three federal provisions lurking in the case, in the apparent hope that the Court will find one of the candidates sufficient: (1) the FDIA, see Resp. Br. 47; (2) the overall FAA, see *ibid.*; and (3) something of a dark horse, Section 4 itself, see *id.* at 20 (pointing out that a federal court deciding a peti-

tion under Section 4 "necessarily determines" whether the requirements of that provision have been established).

Taken together, these might mean Congress *could*, consistent with the Constitution, extend jurisdiction to include an action like this one. But even together they cannot establish that Discover's action falls within the jurisdiction Congress *has actually granted and limited* in Section 1331. See generally *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 117 (1936) (Section 1331 not satisfied merely because "a question of federal law is lurking in the background").

The FDIA cannot supply jurisdiction because an action seeking to enforce a contractual provision providing for arbitration of an FDIA claim does not arise under that statute—any more than a contractual agreement to dismiss a federal employment discrimination suit or to litigate it in a particular state court arises under Title VII, see *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (describing arbitration agreements as "in effect, a specialized kind of forum-selection clause"). The petition here did not ask the district court to decide the FDIA issue and Section 4 actually *prohibits* it from doing so, requiring it to either compel arbitration or dismiss the proceeding. See 9 U.S.C. § 4. Whether to compel arbitration, the actual issue before the court, in no way "really and substantially involve[d] a dispute or controversy respecting the validity, construction, or effect [of the FDIA]." See *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912).[1]

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[1] Of course, the courts below "construed" the FDIA in order to find jurisdiction on the look-through theory, but a dispute about jurisdiction is not enough to support even constitution-

Nor did the petition seek to vindicate any rights arising under the FAA. On the contrary, Discover sought to hold Ms. Vaden to obligations allegedly imposed under a contract governed by state law. To be sure, the FAA represents "substantive federal law" insofar as it preempts state laws that single out arbitration for unfavorable treatment. See *Perry* v. *Thomas*, 482 U.S. 483, 489-490, 492 (1987). But a party petitioning to enforce a contractual arbitration agreement is no more vindicating rights arising under the FAA than the plaintiffs in *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908), who maintained that the railroad's Hepburn Act defense to their contract suit was unconstitutional, see *id.* at 151, could be said to have been vindicating their rights under the Due Process Clause. The exact same could be said, in fact, by litigants whose agreements to arbitrate *state law* disputes fall within the FAA's coverage. See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) (agreement to arbitrate California Franchise Investment Law dispute was covered, so long as embodied in "a written * * * contract evidencing a transaction involving commerce") (quoting 9 U.S.C. § 2). If enforcing an FAA-covered agreement counts as vindicating a federal right for federal question purposes, then these cases could be removed to federal court on that basis. Cf. 9 U.S.C. § 205. This would, of course, render diversity jurisdiction a "dead letter," to use Discover's words, see Resp. Br. 39, since the Section 1331 route would spare parties the need to satisfy either the complete diversity or amount-in-controversy requirements.

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al "arising under" jurisdiction over the substantive suit itself. See *Mesa* v. *California*, 489 U.S. 121, 136 (1989).

Although it has the virtue of novelty, respondents' third, more tentative suggestion that the interpretation of Section 4 itself is the federal question has the vice of implausibility. At the outset, this theory has the puzzling effect of making a second-order issue about jurisdiction an affirmative reason for finding federal question jurisdiction in the larger lawsuit itself. That a court must decide the "federal" question of injury-in-fact, venue, or complete diversity in a case, however, does not mean that the case itself "arises under" federal law, any more than a hotly-disputed question as to a defendant's status as a federal officer, 28 U.S.C. § 1442, could vault a state criminal prosecution into a federal court's "arising under" subject matter jurisdiction, see *Mesa* v. *California*, 489 U.S. 121, 136 (1989). And although the meaning of Section 4 could in theory be drawn into question in any Section 4 case, a petitioner's entitlement to relief depends on establishing that contractual rights have been violated.

Nor does the proposition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them," Resp. Br. 21 (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976)), avail respondents. That obligation attaches only after the party asserting jurisdiction has carried its burden. Until that time, federal courts have an "unflagging obligation" rooted in respect for Congress's control over jurisdiction and respect for state courts to *not* accept it. See Fed. R. Civ. P. 12(h)(3); 28 U.S.C. § 1447(c). This language is no basis for broadly expanding jurisdiction, let alone for exercising it in actions like this one, where lack of statutory jurisdiction is plain. *Romero*

v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (noting "the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"); *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934) (federal courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined"). "[T]he fair presumption[, in fact,] is * * * that a cause is without [the federal court's] jurisdiction, until the contrary appears." *Turner* v. *Bank of N. America*, 4 U.S. (4 Dall.) 8, 10 (1799).

II. "LOOKING THROUGH" FLOUTS BEDROCK PRINCIPLES OF FEDERAL COURT SUBJECT MATTER JURISDICTION

In her opening brief, petitioner identified two sets of very serious problems inherent in look-through jurisdiction. First, it necessarily requires courts to *hypothesize* what case a Section 4 respondent *would* have brought and decide difficult and important questions of federal law just to make a jurisdictional determination. Such intensive jurisdictional digressions violate core principles of judicial restraint, as well as the principle that jurisdictional rules should be readily administrable "rule[s] of thumb." *Holmes Group* v. *Vornado Air Circulation Sys.*, 535 U.S. 826, 832 (2002). They are also fatally at odds with the FAA's aims of speeding arbitrable disputes out of court and having arbitrators decide questions in the first instance. Indeed, the stripped-down procedural rights that Congress afforded Section 4 respondents are ill-suited to litigating these larger questions and

leave little doubt that Congress did not intend such litigation.

Second, looking through takes no account of what federal jurisdiction typically treats as central: the rightful interest of States. Respondents' theory would allow a federal court to assert jurisdiction based on a hypothetical lawsuit even when the parties were litigating an actual lawsuit in state court over which the federal court could not assert jurisdiction. Describing this parade of undesirables requires no lawyerly creativity. The two appellate decisions ever to attempt to apply look-through, the decision below and the Eleventh Circuit's later-vacated opinion in *Community State Bank* v. *Strong*, 485 F.3d 597, vacated, reh'g en banc granted, 508 F.3d 576 (11th Cir. 2007), are riddled with such problems. See Pet. Br. 42-44; cf. *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("[T]his wolf comes as wolf.").

By way of response, Discover offers the startling assertion that the "examination of the parties' underlying dispute" required in look-through "is little different than the analysis [required to] * * * assess whether" the dispute "falls within the scope of the FAA and the parties' arbitration agreement." Resp. Br. 39. But the federal courts in this case spent years sorting through difficult legal issues, such as whether the FDIA completely preempted petitioner's state-law counterclaims and whether Discover Bank was the real party in interest, one of which required briefing from a federal agency and both of which *would literally never have arisen* if Discover had sought the same order directing arbitration from the Maryland court where it (at least DFS) had filed suit. Fur-

thermore, Discover's brief does not so much as mention, let alone respond to, *Strong*, in which Judge Marcus spent 31 pages of slip opinion attempting to faithfully apply the look-through rule—and then wrote another 48-page opinion concurring in his own judgment to explain why the rule was untenable.

III. RESPONDENTS FAIL TO CLOSE THE MANY BIZARRE JURISDICTIONAL GAPS LOOK-THROUGH CREATES

As petitioner argued and lower courts have recognized, look-through jurisdiction creates several serious jurisdictional gaps within the FAA. Pet. Br. 40-41; *e.g.*, *Drexel Burnham Lambert, Inc.* v. *Valenzuela Bock*, 696 F. Supp. 957, 963 (S.D.N.Y. 1988). Since Section 4 contains the "save for" clause that respondents believe repeals section 1331's well-pleaded complaint rule and Sections 7, 9, 10, and 11 do not, under the respondents' own reasoning these later sections should not authorize look-through. Thus, although a federal court could look through to obtain jurisdiction to compel arbitration, it could not later look through to confirm, vacate, or modify the award *in the same case*. Only a state court could do so.

Respondents attempt to overcome this "bizarre," *ibid.*, result through legal hand-waving. They claim—without any explanation in a two-sentence footnote—that unspecified "textual differences" and "this Court's [specific] analysis of Section 4," Resp. Br. 35-36 n.20, somehow leap over the problem. This will not do. The text of these later provisions just as clearly does not contain "save for" language as the text of Section 4 does. If that language is, as respon-

dents contend, what creates look-through in Section 4, it cannot do so in the later provision. And their amici offer no better explanation. Only two, the two law professors, even address the problem and they ask this Court to adopt a grand "unified theory of jurisdiction" grounded in the "emanat[ions]" of Sections 3 and 4 to resolve it. Law Professors Amicus Br. 29. Their "unified theory," however, rides roughshod over the text. It simply takes "a jurisdictional principle[, the two professors believe,] emanates" from two provisions—only one of which actually contains the critical "save for" language—and applies it without any warrant to other provisions lacking that same language. In their hands, the FAA's text becomes a pretty plaything. Although courts may sometimes find rights in the penumbras of and emanations from express constitutional provisions, see *Griswold* v. *Connecticut*, 381 U.S. 479, 483-484 (1965), jurisdictional inquiries are far more circumspect. A mere jurisdictional emanation surely cannot repeal, let alone by implication, the core restriction on statutory federal question jurisdiction.

IV. THE DECLARATORY JUDGMENT ACT DOES NOT SUPPORT, LET ALONE SUPPLY, FEDERAL QUESTION JURISDICTION HERE

Respondents, like the court below, inves t much effort in asserting the "close[ness]" of the "analog[y]" between the jurisdiction they ask the Court to sustain here and a case where a litigant asks a federal court for a "negative declaration" that its actions do not violate another party's federal rights. Resp. Br. 11. Just as the defendant's federal claim supplies juris-

diction in such cases, so too it should here, respondents argue.

This analogy fails for a fundamental reason: even on respondents' reading, the reason a federal court has Section 1331 subject matter jurisdiction in a declaratory judgment action is because it is being asked to decide a federal question. Whether or not the Declaratory Judgment Act alters the application of the well-pleaded complaint rule, it does not relieve the party invoking the federal court's jurisdiction of its obligation to show that the dispute it asks the court to decide is determined by federal law. Respondents acknowledge this difference *en passant*, implying that it is a minor imperfection in an otherwise compelling analogy. See Resp. Br. 20 ("To be sure, the district court does not * * * resolve the underlying dispute."). But this is a fatal flaw and makes clear that declaratory judgment cases offer Discover no help in carrying its Section 1331 burden.

Discover also mischaracterizes declaratory judgment jurisdiction law. In *Textron Lycoming Reciprocating Engine Div.* v. *UAW*, 523 U.S. 653 (1998), this Court pointedly refused to "indulg[e]" the precise "assumption[]" on which respondents' analogy rests: that "federal-question jurisdiction can be established on the basis of an anticipated federal claim, even when the declaratory-judgment plaintiff has a nonfederal defense," *id.* at 659-660. In a footnote, respondents half-heartedly answer that this is not a problem here because "Discover * * * does have a federal substantive claim to relief" and "petitioner's completely preempted underlying claim can only arise under federal law." Resp. Br. 20 n.10. But that is simply wrong. The language Discover points to in

support of its first proposition says only and uncontroversially that the FAA represents a body of federal substantive law. *Ibid.* (citing *Moses H. Cone*, 460 U.S. at 25 n.32 and *Southland*, 465 U.S. at 12). Needless to say, the FAA may create substantive law but it creates no "substantive claim to relief" in the sense a declaratory judgment requires. And Discover's second proposition, that *petitioner's* state-law counterclaim might for some purposes be deemed federal, is unresponsive to *Textron*, which talks of the declaratory-judgment *plaintiff's* need to have a federal claim.

V. NEW JERSEY'S SITUATION WHEN IT ENACTED ARBITRATION REFORM SUPPORTS PETITIONER'S VIEW OF SECTION 4

Respondents and certain amici argue that New Jersey's failure to merge law and equity until 1947 somehow means that Section 4's "save for" language could not have been intended to address ouster. Resp. Br. 33; Cintas Amicus Br. 13; Law Professors Amicus Br. 19-20. This argument, however, reflects a shallow view of history.

New Jersey was a leading commercial state and its courts favored arbitration long before 1923. See S. Whitney Landon, *Commercial Arbitration in New Jersey*, 1 N.J. L. Rev. Univ. of Newark 65, 75-78 (1935) (citing cases). Indeed, despite an ostensible ban on executory arbitration agreements, New Jersey courts approved arbitration of future land damage disputes, *e.g.*, *Hoagland* v. *Veghte*, 30 N.J.L. 516 (Ct. Err. & App. 1862), and enforced agreements to arbitrate future disputes under the fiction that arbitra-

tion was a contractual "condition precedent" to litigation, James B. Boskey, *A History of Commercial Arbitration in New Jersey*, 8 Rutgers-Cam. L.J. 1, 20 (1976)).

In arbitration matters, moreover, New Jersey had blended legal and equitable authority well before the 1947 "merger." It long had special statutory procedures for arbitration, including enforcing an award as a rule of court, and its courts had concluded long before that "[t]he court * * * has jurisdiction of the case by statute, and * * * [t]he statute contemplates no difference in the power or jurisdiction of the court, or in the mode of proceeding, whether the submission be made a rule of a court of law or equity." *Stoll* v. *Price*, 21 N.J.L. 32 (1847); see Act of Dec. 2, 1794 § 1, Laws of the State of New Jersey 142 (Paterson ed.) (quoted in James B. Boskey, *A History of Commercial Arbitration in New Jersey*, 8 Rutgers-Cam. L.J. 1, 9 (1976)); *Imlay* v. *Wikoff*, 4 N.J.L. 132 (N.J. 1818) (noting that arbitrators may exercise both legal and equitable powers). And despite the continuing formal distinction between law and equity, the New Jersey Supreme Court summarily rejected a constitutional challenge to the 1923 Arbitration Act as "encroach[ing] upon the jurisdiction of the Court of Chancery over specific performance of contracts of arbitration" as "plainly unsound" under case law *existing before* passage of the Act. *Sommer* v. *Mackay*, 160 A. 495, 496 (N.J. 1932) (per curiam) (citing *Davila* v. *United Fruit Co.*, 103 A. 519 (N.J. 1918)).

The New Jersey legislature had thus to worry little about overcoming unfavorable case law or that courts would be reluctant to exercise their equitable jurisdiction to enforce an arbitration agreement. As

in New York, the existing state of affairs was in many ways favorable to arbitration. But unlike New York,

> [t]his supportive attitude extended to the enforcement of executory arbitration agreements, with a full panoply of enforcement remedies. Thus, the reforms imposed by the 1923 Arbitration Act did not reflect a dissatisfaction with the attitude of New Jersey court[s, as respondents and their amici assume]; rather the legislation represented a codification of prior case law, complemented by a dissatisfaction with arbi tration law throughout the United States.

Boskey, 8 Rutgers-Cam. L.J. at 22. New Jersey did not need "save for" language because it had little negative case law to overcome and, in the arbitration area, less division of law and equity to attend to.

VI. CASE LAW APPLYING SECTION 1332 DOES NOT SUPPORT RESPONDENTS' ARGUMENT FOR AN EXCEPTION TO SECTION 1331

Unable to point to a federal issue meeting Section 1331's requirements, Discover shifts attention to a different statutory provision, identifying what it claims will be the "practical consequence[]" of construing Section 4 as jurisdiction-conserving here. Resp. Br. 26. If the Court were to uphold ordinary Section 1331 requirements in cases like this one, Discover insists, courts would have no choice but to abandon their accepted method for ascertaining the amount in controversy in arbitration petitions brought under Section 1332, which looks through to

the amount sought in arbitration, rather than, say, attempting to monetize the marginal value of directing arbitration. Lest it jeopardize this settled regime for applying Section 1332, respondents warn, the Court should affirm the decision below.

But there is an obvious problem with respondents' house-of-cards argument. What they present as a practical impossibility—an approach that rejects "looking through" in federal question cases *and* still applies the Section 1332 amount-in-controversy requirement in the fashion they urge—is in fact the dominant, settled approach in the federal courts of appeals. See Pet. Br. 26 nn.12 & 13 (citing cases). But practicalities aside, respondents are wrong—and those courts correct—as a matter of logic, as well. Once again, the respondents look to the wrong statute. If, as they erroneously assume, Section 4 were a statute conferring jurisdiction on the district courts, there might be some need to explain seeming differences in its application in diversity and federal question cases. But once Section 4 is recognized for what it is—a provision granting a remedy and clearing away ouster objections in actions where federal court subject matter jurisdiction must be independently established—the contention that courts are applying two separate jurisdictional statutes differently is no more noteworthy than "dog bites man."

Thus, the decisions respondents seek to hang around petitioner's neck are not examples of construing Section 4 to authorize look-through, but rather instances of applying established Section 1332 principles to arbitration disputes. That courts make diversity jurisdiction's amount-in-controversy determination by looking through to the dispute sought to

be arbitrated does not distinguish arbitration from non-arbitration. See *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 288-290 (1938) (holding that amount in controversy rests on value of underlying dispute). In both lawsuits and arbitrations, courts routinely look through to the underlying dispute to determine the stakes. Petitioner's position on Section 4 is thus consistent and logical. Section 4 simply does not affect either Section 1331's or Section 1332's usual application.

Indeed, it is respondents who must "do an about-face when it comes to diversity jurisdiction." Resps. Br. 25-26 (internal quotation omitted). If Section 4 itself mandated a general look-through approach, it would *restrict*, not expand, the number of petitions that could be brought under diversity. That is because Section 1332 generally does not "look through" in applying the statutory complete-diversity requirement. Except in a narrow class of cases, see Fed. R. Civ. P. 19(b), the fact that a plaintiff sues only some potential defendants and not others who would spoil the required complete diversity does not affect a district court's Section 1332 jurisdiction. *Horn* v. *Lockhart*, 84 U.S. (17 Wall) 570, 579 (1873). Indeed, that rule repeatedly has been applied in the FAA context. See *Moses H. Cone*, 440 U.S. at 932 & n.4 (finding complete diversity in Section 4 petition despite no complete diversity in dispute sought to be arbitrated); see also *America's MoneyLine, Inc.* v. *Coleman*, 360 F.3d 782, 785 (7th Cir. 2004) (holding that complete diversity is based on "the parties to the petition to compel arbitration, *not* the underlying controversy") (emphasis added); *Doctor's Assocs.* v. *Distajo*, 66 F.3d 438, 445 (2d Cir. 1995) (same). If Section 4 operated

to repeal Section 1332's anti-look-through regime with respect to complete diversity, as respondents argue it operates to repeal Section 1331's well-pleaded complaint rule, fewer petitions to compel could be brought in federal court.

It is respondents' theory of Section 4, in fact, that entails a suspiciously inconsistent approach, requiring look-through to apply fundamentally differently in two dimensions of the *same* statute, Section 1332. Petitioner's reading of Section 4—the one followed by the majority of the federal courts of appeals—encounters no comparable difficulty. Because the provision creates a remedy (and the relevant language only lifts the "ouster" obstacle), it should not and does not affect ordinary Section 1332—or Section 1331—principles at all.

VII. RESPONDENTS' REMAINING ARGUMENTS AGAINST PETITIONER'S CONSTRUCTION OF SECTION 4 ARE UNPERSUASIVE

Respondents reserve the longest section of their brief, II(B), not for laying out any affirmative arguments of their own, but for a scattershot attack on petitioner's reading of Section 4. None of these many negative arguments, however, convinces.

First, what respondents themselves identify as their strongest argument, Resp. Br. 27 ("The clearest indication that petitioner's interpretation is wrong * * *."), rests on a category mistake. They state the obvious, that "Section 4 explicitly directs courts to compel arbitration *only* when the *right* to arbitrate is not in issue," but then conclude that "[g]iven this direct command, it would be passing strange for Con-

gress to include the 'save for' clause in Section 4 based on a need to assure district courts that the existence of an agreement to arbitrate does not 'oust' them of jurisdiction * * *." *Id.* at 27-28 (second emphasis added). That is true, of course, only if subject matter jurisdiction is coextensive with the substantive right to arbitration—a position even broader than the one respondents would have this Court adopt and one this Court has repeatedly rejected when holding that the FAA itself grants no jurisdiction. *E.g.*, *Moses H. Cone*, 460 U.S. at 25 n.32.

Second, respondents argue that petitioner's construction of Section 4 "would require additional words to be added to the statutory text" because "'save for such agreement' [really means] save for [prior judicial unwillingness to enforce any] such agreement." Resp. Br. 28 (second alteration in original). But this is silliness. The same could be said of nearly any statute or contract. The phrase "because of such law or contract," for example, really means "because of [how a court would enforce] such law or contract." The former is simply clear shorthand for the latter. It should be remembered, moreover, that respondents' forced construction of Section 4 makes the critical term "save for such agreement" surplusage. Given respondents' reading of the other relevant statutory terms, these few words could be dropped from Section 4 without changing respondents' view of its meaning. See Pet. Br. 33.

Third, respondents claim petitioner's interpretation of the "save for" clause makes Section 2 "superfluous." Resp. Br. 28. This is untrue. See pp. 10-12, *supra*; Pet. Br. 22-26. Because of differences between the state and federal courts, Congress, unlike the

New York and New Jersey Legislatures, could not rely simply on the words of Section 2 to overturn the ouster doctrine. In the federal courts, such language would have only partially overcome it. *Ibid.* And, in any event, Section 2 addresses more than ouster.

Fourth, respondents argue that the lack of "save for" language in Section 3 means that this language cannot address ouster in Section 4. Resp. Br. 29. This is incorrect. Unlike Section 4, Section 3 specifically directs the federal court to "stay the trial of the action until * * * arbitration has been had." 9 U.S.C. § 3. In other words, under Section 3, the district court *retains* jurisdiction throughout the arbitration and after it. There is simply no danger of ouster. That Section 3 addresses the ouster problem in a way Section 4 cannot underscores—not undercuts—the necessity of "save for" language in the latter section.

Fifth, respondents argue that Section 4's "save for" language cannot have been meant to address the ouster doctrine because, they believe, the "ouster" doctrine did not actually divest the courts of jurisdiction but rather reflected the court's refusal to specifically enforce arbitration agreements "because the *effect* of specific enforcement would be to divest courts of jurisdiction." Resp. Br. 30. But this is a verbal quibble. Whether "ouster" marked an ontological jurisdictional void or simply a lack of jurisdiction due to the "*effect*" of arbitration, the courts lacked jurisdiction.

Sixth, respondents argue that Section 4's "controversy between the parties" cannot refer to a traditional suit seeking specific performance of a contract (as opposed to the dispute sought to be arbitrated) because "[i]f the controversy in question were * * *

the controversy about whether to enforce the contract to arbitrate, then Section 4 would make no sense because without the contract to arbitrate itself, there could be nothing to enforce." Resp. Br. 32. This argument defies understanding until one realizes that it represents nothing more than a metaphysically enhanced version of respondents' view of the phrase "save for such agreement." If "save for" means simply, as respondents claim, "put to one side," Resp. Br. 32; see also *id.* at 14, 15, 17, and one treats that injunction seriously as a metaphysical matter, then of course the agreement is out of the picture and perhaps, in some sense, "there could [be said to] be nothing to enforce." But respondents' "put to one side" view of the "save for" language rests on, as petitioner explained in discussing the Fourth Circuit's similar view, a very strained reading of the language that conflicts with their own argument that the words "save for" mean "but for" or "notwithstanding." See Pet. Br. 31-34. And metaphysical hype cannot improve a faulty argument. If the agreement exists at all, as commonsense and a straight-forward reading of "save for" as "but for" or "notwithstanding" would hold, there is—*pace* respondents—something to enforce.

Seventh, respondents argue that "controversy" could not refer to a suit for specific performance to enforce an arbitration provision because all such suits would have arisen only in equity or in admiralty, whereas the original version of Section 4 referred to "controversies" over which the district courts would have jurisdiction "under the judicial code at law, in equity, or in admiralty." Resp. Br. 32-33 (quoting Act of Feb. 12, 1925 ch. 213, § 4, 43 Stat. 883). Thus,

they claim, petitioner's view makes the two words "at law" irrelevant. Respondents place, however, more weight on this phrase than it can reasonably bear. The term "under the judicial code at law, in equity, or in admiralty" was meant—much as the phrase "Title 28" was later—as a catch-all to refer simply to jurisdiction grounded somewhere in the judicial code. Pet. Br. 30-31 & n.4. Nothing suggests that Congress intended every individual part of this all-encompassing standard formulation to have a Section 4 referent. That would, as petitioner showed with respect to the Fourth Circuit's similar argument about "Title 28," lead to absurd results. *Id.* at 28-31 & n.4. That Section 4 provides, as respondents recognize, Resp. Br. 34, a hybrid action including jury trials, which were unavailable at equity, makes the original reference to "at law" completely understandable.

Eighth, respondents claim that petitioner's reading of Section 4 cannot be reconciled with the structure of the FAA. Resp. Br. 34. It is respondents, however, who fail here. They, not petitioners, fail to explain how a jurisdictionally inert act, see *Hall St. Assocs.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008); *Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 15 n.9, can create jurisdiction, let alone partially repeal Section 1331. Somehow they conclude that since "the Court's *general* conclusion that the FAA creates no 'independent' federal jurisdiction was based upon the Court's *specific* analysis of the jurisdictional language of Section 4," Resp. Br. 35, they can jump over this difficulty. The fact that this Court's "*general*" conclusion against jurisdiction rests on "*specific*" analysis of Section 4, however, compounds their problem. If the conclusion that nothing

in the FAA creates subject matter jurisdiction rests on a close reading of, among other things, Section 4, then Section 4 itself certainly cannot create any.

Ninth, respondents similarly fail to explain how Congress's clear express grant of look-through jurisdiction in Chapter 2 of Title 9 can be reconciled with their argument by strained implication as to Chapter 1. As Section 205 shows, when Congress wanted to refer to the dispute sought to be arbitrated, it did not use Section 4's term "controversy between the parties," as respondents claim, but direct, straightforward language, see Pet. Br. 39, and, when it wanted to repeal the well-pleaded complaint rule to allow look-through, it knew how to do so clearly and unequivocally, see *ibid.*; 9 U.S.C. § 205 ("The procedure for removal of causes otherwise provided by law shall apply, *except that the ground for removal * * * need not appear on the face of the complaint but may be shown in the petition for removal.*") (emphasis added), as this Court requires, see Pet. Br. 20-21. Respondents cannot ground a repeal of Section 1331 on such uncertain and speculative foundations when other provisions concerning arbitration in the same title show that Congress knew exactly how to accomplish this result, if it wanted.

Finally, respondents claim that not "looking through" in federal question cases somehow violates the purposes of the FAA. Petitioner agrees that one goal of the FAA "is to provide a mechanism through which the parties can ensure the enforceability of agreements to arbitrate," Resp. Br. 36, so long as those agreements fall within the coverage of the Act. The FAA does not, however, as respondents seem to assume, allow enforcement of every arbitration

agreement in federal court. Some agreements to arbitrate fall outside the FAA's coverage and some, like this one, may fall within the FAA's substantive coverage but (because federal subject matter jurisdiction is missing) be enforceable under the FAA only in state court. Respondents also make much of the fact that state arbitration law may not track the FAA exactly. Resp. Br. 38. That fact is true but irrelevant. Although it is an open question whether Section 4's particular *procedural* provisions apply in state court, *e.g.*, *Southland*, 465 U.S. at 16 n.10; *Moses H. Cone*, 460 U.S. at 26 n.35, it is clear that the FAA's *substantive* provisions fully apply there, *Southland*, 465 U.S. at 14-16, and, in particular, that a state court must enforce the FAA through an ordinary action seeking specific performance, 465 U.S. at 24 (O'Connor, J., dissenting) ("the Court reads [the FAA] to require state courts to enforce [its substantive rights] using procedures that mimic those specified for federal courts by FAA §§ 3 and 4").

VIII. *HOLMES GROUP* BARS GROUNDING LOOK-THROUGH JURISDICTION ON A STATE-LAW COUNTERCLAIM

Even if this Court accepts look-through jurisdiction as a general matter, no "arising under" jurisdiction exists here, as *Holmes Group* shows. Discover fails to grapple, however, with the implications of this Court's reasoning in that case. Instead it serves up feeble literalism, observing that "*Holmes Group* does not purport to say anything about a district court's jurisdiction to compel arbitration under Section 4 of the FAA," Resp. Br. 41, and that the holding below

"poses no threat to * * * removal jurisdiction for the simple reason that it does not involve an issue of removal jurisdiction at all," *id.* at 46. This misses the point rather grievously. To begin, *Holmes Group* did "not involve an issue of removal jurisdiction" either. It concerned the interpretation of 28 U.S.C. § 1295(a)(1), which establishes the Federal Circuit's appellate jurisdiction and which in turn references 28 U.S.C. § 1338. See 535 U.S. at 829. In deciding the statutory jurisdictional question, however, the Court relied on principles that apply across those various statutory provisions—and on the basic norm that those statutes should operate as a coherent whole. See *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (emphasizing the need for "reason and coherence" across the various statutes constituting "the mosaic of federal judiciary legislation.").

More baffling still is respondents' ostensible "refutation" of the idea that "jurisdiction under Section 4 * * * depend[s] upon the pendency of a[] lawsuit." Resp. Br. 41. Petitioner's brief made no such claim. Indeed, her point was almost the exact opposite: that when an issue actually arises in a suit pending in state court and the case is not removable, Congress could not have intended for federal courts to entertain a Section 4 action. Whatever can be said for deciding jurisdiction based on a hypothetical case, it is much more extreme to rely on a hypothetical in preference to reality. It is at least doubtful, moreover, that Congress meant for Section 4 to apply to pending state cases at all. That Section 4 includes no language, akin to that in Section 3, empowering the federal court to stay state court proceedings, is no small matter. Although the courts below granted Discover's

requested stay quite readily, the framers of the FAA legislated against a very different set of background understandings, one which generally accepted concurrent proceedings, see, *e.g.*, *Kline* v. *Burke Constr. Co.*, 260 U.S. 226 (1922), but in which anti-suit injunctions of the kind issued here were almost wholly impermissible, see *ibid.* (interpreting Section 265 of the Judicial Code). Reading Section 4 as authorizing federal courts to direct arbitration of claims pending in state courts requires believing either that Congress in enacting Section 4 intended to provide an essentially toothless (yet friction-inducing) remedy in 1925, since the courts would not stay the pending state court proceedings when they issued a Section 4 order, or that Congress intended in this one section to overturn much well-settled law to provide such stays—without ever saying so. In removable cases, of course, a party could remove and stay litigation under Section 3. But if a state case were non-removable, a Section 4 order to compel would require an anti-suit injunction to be effective and the federal courts were loathe to provide one.

If anything, the exception to settled jurisdictional rules created by the Fourth Circuit here is in fact much *less* defensible than the one this Court refused to create in *Holmes Group*. First, *Holmes Group*, which concerned federal appellate jurisdiction, did not involve state courts. The friction created by parallel proceedings like the ones permitted here is even greater than in the *Holmes Group* setting, where the case was pending in only one court system. Second, the interest in expert, uniform interpretation of federal law was at its zenith in *Holmes Group*. It concerned a congressional determination that appeals

should be channeled to a specialized, expert court. See generally *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (explaining the purposes of Section 1331 jurisdiction). Here, allowing a federal court to direct arbitration of FDIA claims cannot promote uniform or expert interpretation of *that* statute. Arbitrators will decide these claims. Third, and obviously, an approach that requires the court to guestimate the contours of a hypothetical case furnishes much less of a clearly administrable rule of thumb than even the "well-pleaded-complaint or -counterclaim rule" that *Holmes Group* refused to embrace. 535 U.S at 832.

In the face of all this, Discover identifies a single consideration that it believes makes the case for federal jurisdiction stronger here than in *Holmes Group*: because "Discover is the plaintiff in the state-court proceeding," respondents observe, "there is no danger of depriving Discover (the master of the state court complaint) of its chosen forum." Resp. Br. 46. But this is silly. More than a half century before *Holmes Group* this Court made clear in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941), that there is less justification for allowing a state court plaintiff to remove its case to federal court than for allowing a state court defendant to do the same.

This Court has long rejected such complex and uncertain approaches to jurisdiction. In *Swift Co.* v. *Wickham*, 382 U.S. 111, (1965), for example, this Court jettisoned the *Kesler* rule, see *Kesler* v. *Dep't of Pub. Safety*, 369 U.S. 153 (1962), for interpreting the former three-judge court statute, 28 U.S.C. § 2281 (repealed 1976). After noting that "in order to ascer-

tain the correct forum, the merits must first be adjudicated," the Court explained:

> procedural rule[s] governing the distribution of judicial responsibility * * * must be clearly formulated. The purpose of the three-judge scheme was in major part to expedite important litigation: it should not be interpreted in such a way that litigation, like the present one, is delayed while the proper composition of the tribunal is litigated. [The *Kesler*] formulation, whatever its abstract justification, cannot stand as an every-day test for allocating litigation between district courts of one and three judges.

Wickham, 382 U.S. at 124.

IX. THE DISTRICT COURT'S ARTICLE III JURISDICTION WAS ALSO SERIOUSLY QUESTIONABLE

Although the Court may—and should—enforce the limits laid down in Section 1331 without deciding whether Discover's action would also fail on Article III grounds, see *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007), petitioner also noted, Pet. Br. 52-56, a substantial question as to the district court's Article III jurisdiction. At the time respondents petitioned the federal court, Discover had not suffered any injury, see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), because Ms. Vaden's conduct—litigating, instead of arbitrating, her counterclaims—was, on *Discover's own theory*,

entirely lawful, see Resp. Br. 51 (quoting J.A. 35); *PaineWebber, Inc.* v. *Faragalli*, 61 F.3d 1063, 1067 (3d Cir. 1995) ("[I]t is doubtful that a petition to compel arbitration filed before the 'adverse' party has refused arbitration would present an Article III court with a justiciable case or controversy") (citations omitted); see also *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (holding that Article III standing is determined "at the outset of the litigation"). Respondents do not identify any injury Discover had suffered when it sued. Rather, Discover points to what happened *after* filing, *e.g.*, Resp. Br. 52, apparently hoping that this Court does not notice or attach legal significance to the difference.

Petitioner also continues to question respondents' second premise: that Ms. Vaden's defense of this litigation can be treated as an injury-causing refusal. See Resp. Br. 49-52. Courts hold otherwise. *Spann* v. *Colonial Vill.*, 899 F.2d 24, 27 (D.C. Cir. 1990); see also *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976) (noting that "communication * * * made in the course of a judicial proceeding * * * surely cannot provide retroactive support" for plaintiff's claim of injury). But Discover's position is legally inadequate in any event, unless Discover is also right in assuming that lack of Article III standing is a defect that may be "cured" by later developments in a case.

Respondents cite no authority for that proposition, and the closest they come, see Resp. Br. 52, a "cf." citation to *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996), which held that complete diversity at the time of judgment was sufficient to cure an erroneous application of the removal statute, is not nearly close

enough. As this Court's subsequent decision in *Grupo Dataflux* v. *Atlas Global Group*, 541 U.S. 567 (2005), made clear, the practice at issue in *Lewis*, dismissal of a party whose presence defeated complete diversity, "had long been an exception," *id.* at 572, to the rule that the time of filing controls. And *Dataflux* further explained that the "considerations * * * of finality, efficiency, and economy" *Lewis* cited could support overlooking a *statutory* defect, but never a jurisdictional one. *Id.* at 574.

Nor does the unexceptionable principle that "'[j]urisdiction * * * is not defeated * * * by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover,'" Resp. Br. 49 (quoting *Bell* v. *Hood*, 327 U.S. 678, 682 (1946)), help Discover here. The question is not whether Discover "could actually recover" in the Section 4 action because, for example, the agreement asserted was not binding on Ms. Vaden or does not cover the interest rate dispute, but rather whether, *on Discover's own version of the disputed facts*, it had suffered any injury when it came before an Article III court.

X. THE SUPPOSED RELUCTANCE OF SOME STATE COURTS TO ENFORCE ARBITRATION CANNOT JUSTIFY THIS COURT'S REPEAL OF SECTION 1331'S REQUIREMENTS

Another drumbeat theme of Discover and its amici is that an expansive, jurisdiction-conferring construction of Section 4 is necessary because state courts are reluctant to enforce arbitration obligations. See, *e.g.*, Chamber of Commerce Amicus Br. 6-24. Respondents, however, never advance *any* basis for asserting that the Maryland court in which they filed suit would not have stayed litigation and ordered arbitration had they asked. As respondents acknowledge, the Maryland court could not as a matter of law have decided this case differently; state and federal courts are bound to enforce arbitration agreements on the same terms as other contracts. Section 2 applies the same to each. *Southland*, 465 U.S. at 10-16.

Their only complaint about Maryland is that "federal court jurisdiction is all the more critical where, as here, the parallel state court system has held that it is not bound by Section 4 of the FAA." Resp. Br. 23. But this is little more than word-play. To complain that Section 4's procedures cannot be enforced in state court is no different from complaining that rights under Rule 26 can only be vindicated in federal court, especially when state courts cannot single out covered arbitration agreements for adverse procedural treatment. See *Preston* v. *Ferrer*, 128 S. Ct. 978 (2008). That federal statutory claims are subject to different, nondiscriminatory procedural rules in state court is thin support for claiming hostility. Indeed, the case respondents cite for the proposition that a

federal forum is especially critical, *Walther* v. *Sovereign Bank*, 872 A.2d 735 (Md. 2005), undercuts that very proposition. It suggests that Maryland litigants need not run the gauntlet to enforce an arbitration agreement. As the court explained: "The Maryland Uniform Arbitration Act * * * was purposefully meant to mirror the language of the FAA. [It is t]he State analogue . . . to the Federal Arbitration Act [and] the same policy favoring enforcement of arbitration agreements is present in both our own and the federal acts." *Id.* at 742 (internal quotations omitted).

But even if respondents and amici could show that state courts were refusing to follow federal law, judicial expansion of jurisdiction limited by Congress would not be the proper remedy. Rather, this Court's direct review of final decisions of state courts is the appropriate means of ensuring that they comply with their Article VI duty to give effect to federal law. William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 Cal. L. Rev. 263, 302 (1990). And, of course, this Court need not grant review in every case to effectively supervise recalcitrant courts. But even if direct review were insufficient, only Congress, not this Court, can repeal the well-pleaded complaint rule, even with respect to only a single category of cases.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to be dismissed for lack of jurisdiction.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND CTIA—THE WIRELESS ASSOCIATION® AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND CTIA—THE WIRELESS ASSOCIATION® AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes.[1] Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

CTIA—The Wireless Association®, formerly known as the Cellular Telecommunications & Internet Association, represents all sectors of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and internet companies, as well as other contributors to

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. A letter reflecting the parties' blanket consent to the filing of *amicus* briefs has been filed with the Clerk's office.

the wireless universe. CTIA frequently participates in regulatory and judicial proceedings and coordinates efforts to educate government agencies and the public about wireless industry issues.

The Chamber and CTIA have regularly participated as *amici curiae* in cases before this Court addressing arbitration issues, including, most recently, *Preston* v. *Ferrer*, 128 S. Ct. 978 (2008) (Chamber and CTIA); *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396 (2008) (CTIA); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006) (Chamber); *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003) (Chamber); and *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001) (Chamber).

Many members of the Chamber and CTIA have found that arbitration allows them to resolve disputes promptly and efficiently, while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions as standard features of their business contracts. Because disputes involving these members may arise in any or all of the states, they rely on the protection afforded by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, to ensure that their arbitration agreements are enforced despite the vagaries of state law and varying preferences of state courts. For this reason, *amici* have a strong interest in ensuring that efforts to enforce such agreements proceed in fora that will faithfully follow this Court's "strong endorsement of the Federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

INTRODUCTION AND SUMMARY OF ARGUMENT

The FAA was enacted in 1925 "to reverse the longstanding judicial hostility to arbitration agreements" (*Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)) and to declare "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" (*Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Despite this Court's repeated reaffirmations of this pro-arbitration policy and reversals of state-court rulings that threatened to undermine it, it is clear that several States—most notably Montana, California, West Virginia, and Pennsylvania—remain resistant to the enforcement of arbitration agreements. That state-court hostility to the FAA makes the availability of jurisdiction under Section 4 all the more critical.

As respondents ably explain, the plain language of Section 4 of the FAA provides a clear answer to the jurisdictional question on which certiorari was granted. But even if the statute were ambiguous, the strong federal policy favoring arbitration, together with the persistent resistance to arbitration demonstrated by some state courts, would provide an additional reason for giving the broad jurisdictional language of Section 4 its plain and natural reading, particularly when, as in this case, the underlying dispute to be arbitrated arises under federal law.

Put another way, there is no good reason to adopt the artificially narrow interpretation of Section 4 advanced by petitioner. To the contrary, leaving the determination of arbitrability to state courts when the plain language of the statute does not require such a course would needlessly frustrate "Con-

gress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" (*Preston*, 128 S. Ct. at 986 (quoting *Moses H. Cone*, 460 U.S. at 22)). In addition, adopting petitioner's approach would result in this Court being confronted with a far greater number of petitions for certiorari raising substantial questions of preemption under the FAA. Thus, the decision below is supported not only by the plain language of the statute but also by clear federal policy and prudential considerations.

ARGUMENT

As the Court reiterated last Term, "the Federal Arbitration Act * * * establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston*, 128 S. Ct. at 981. It is by now well-established that the FAA "supplies not simply a procedural framework applicable in federal courts" (*ibid.*); it also "creates federal substantive law requiring parties to honor arbitration agreements"—law that "appl[ies] in state as well as federal courts." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 n.9, 16 (1984); see also *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270–272 (1995) (reaffirming *Southland*); *Preston*, 128 S. Ct. at 983 n.2 ("[a]dhering to precedent, we do not take up [respondent's] invitation to overrule *Southland*"); *Moses H. Cone*, 460 U.S. at 24 (FAA requires application of federal substantive law "notwithstanding any state substantive or procedural policies to the contrary").

Even though the FAA makes an agreement to arbitrate "valid, irrevocable, and enforceable" (9 U.S.C. § 2) as a matter of federal law in both federal and state court, the experience of *amici*'s members is

that many state courts express open hostility toward arbitration and distort background state contract law to invalidate arbitration agreements. See, *e.g.*, Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 161–204 (2005); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006). By failing to adhere to the FAA's command that arbitration agreements be treated as valid and enforceable, such state courts act in defiance of clear instructions from Congress and this Court.

The consequence of this failure to honor the FAA's mandate is that, in a number of States, the enforceability of arbitration agreements depends as a practical matter on whether a federal forum is available to compel arbitration. Indeed, federal courts in a number of States have been forced to admonish the state courts for refusing to adhere to the FAA's requirements. Nonetheless, many state courts remain unalterably opposed to enforcing arbitration agreements.

It is thus apparent that the very same "judicial hostility to arbitration agreements" that the FAA was enacted to overcome (*Gilmer*, 500 U. S. at 24) remains alive and well in many state courts. Therefore, while we fully concur in respondents' position that Section 4's plain language authorizes their petition to compel arbitration to proceed in federal court, the strong federal interest in promoting arbitration, together with the growing rift between state and federal courts in a number of jurisdictions, provides an additional reason for this Court to give Section 4's broad language its natural meaning—rather than

the artificial and insupportably narrow interpretation that petitioner seeks to give it.

A. The judicial hostility towards arbitration that the FAA was enacted to overcome remains alive and well in some state courts.

A number of state courts have repeatedly sought to evade this Court's decisions holding that the FAA preempts state-law rules that frustrate arbitration. These courts have routinely distorted traditional state-law contract doctrines—particularly the reasonable expectations and unconscionability doctrines—to impose special hurdles and barriers to the enforcement of arbitration agreements, obstacles that are not applicable to contracts generally. Indeed, in many cases, state courts have gone so far as to declare the most basic and defining characteristics of arbitration to be substantively unconscionable as a matter of law.

This state-court resistance both to arbitration and to the strong federal policy supporting it has largely been led by the Montana Supreme Court, which has engaged in the most open and egregious defiance of the FAA; the California, West Virginia, and Pennsylvania courts, among others, have issued similar decisions, explicitly or implicitly expressing hostility to arbitration. This hostility unfortunately has not been limited to these specific jurisdictions; rather, these jurisdictions vividly illustrate a broader problem: An increasing number of state courts across the country are devising new ways to subvert the FAA on a variety of pretextual grounds.

1. ***Montana.*** The Montana Supreme Court's repeated efforts to undercut the FAA present the

starkest example of judicial hostility to arbitration. After this Court made clear in *Southland*—and again in *Allied-Bruce*—that the FAA preempts state laws that frustrate arbitration, the Montana Supreme Court repeatedly refused to adhere to these decisions, requiring reversal by this Court. See *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996). But rather than accede to this Court's decision, the Montana high court has instead distorted longstanding principles of state contract law and thereby continued to defy the clear direction of Congress and this Court. Its rulings make little effort to hide the Montana court's obvious distaste for the FAA, and they make clear that the state court will continue to seek new grounds to refuse enforcement of nearly any arbitration provision that comes before it.

a. The Montana Supreme Court's ongoing and persistent efforts to impede arbitration are reflected in its decision in *Casarotto* v. *Lombardi*, 886 P.2d 931 (Mont. 1994) (*Casarotto I*), *vacated*, 515 U.S. 1129 (1995), in which the court refused to enforce an arbitration provision because the provision did not comply with a state statute that specifically required arbitration provisions to appear on the first page of a contract. In reaching this result, the Montana Supreme Court failed to follow this Court's decisions in *Southland* and *Perry*, which make clear that the FAA preempts any state law that imposes on arbitration provisions restrictions that are not equally applicable to other contractual provisions. See *Southland*, 465 U.S. 1; *Perry* v. *Thomas*, 482 U.S. 483 (1987). This error was more than a mere mistake; rather, the author of the majority opinion explained in a second, "specially concurring" opinion that the court's decision was motivated by its disagreement

with the FAA and, indeed, hostility toward the federal judiciary:

> To those federal judges who consider forced arbitration as the panacea for their "heavy case loads" and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy, I would like to explain a few things.
>
> What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of * * * the [FAA], and due to their naïve assumption that arbitration provisions * * * are knowingly bargained for, * * * procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick * * * an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it. * * *
>
> [T]hese provisions, which are not only approved of, but encouraged by [federal judges], do, in effect, subvert our system of justice as we have come to know it. If any foreign government tried to do the same, we would surely consider it a serious act of aggression.

Casarotto I, 886 P.2d at 939–941 (Trieweiler, J., specially concurring).

Although the Montana Supreme Court refused in *Casarotto I* to follow this Court's decisions on federal law, the Montana court was given an opportunity to correct its error after this Court granted, vacated, and remanded the case for reconsideration in light of *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265

(1995), which reaffirmed *Southland*. See 515 U.S. 1129 (1995) (Mem.). Yet even after this Court signaled that *Allied-Bruce* and *Southland* were controlling, the Montana Supreme Court insisted that it could "find nothing in the [*Allied-Bruce*] decision which relates to the issues presented to this Court in this case." *Casarotto* v. *Lombardi*, 901 P.2d 596, 598 (Mont. 1995) (*Casarotto II*), *rev'd sub nom. Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996) (*Casarotto III*). Although the court claimed to have given the issue "careful review" (*ibid.*), it had in fact refused to permit any further briefing or oral argument on remand. See *id.* at 599–600 (Gray, J., dissenting); see also *Casarotto III*, 517 U.S. at 686 n.2 (noting that "[d]issenting Justice Gray thought it cavalier of her colleagues to ignore the defendants' request for an opportunity to brief the issues raised by the * * * remand and to present oral argument") (quotation marks omitted). Having failed to reexamine its prior ruling, the court reaffirmed and reinstated its prior decision. *Casarotto II*, 901 P.2d at 596–597.

Ultimately, even after this Court reversed the Montana *Casarotto* decisions, two of the Montana justices insisted on a final act of defiance. When the case returned to the Montana Supreme Court for further proceedings consistent with *Casarotto III*, Justices Trieweiler and Hunt refused to sign the routine remand order, boldly declaring that they could not "in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the United State [sic] Supreme Court's * * * interpret[ation] and appl[ication] [of] the [FAA]." Order at 3, *Casarotto* v. *Lombardi*, No. 94-488 (Mont. Jul. 16, 1996); see also Richard C. Reuben, *Western Showdown: Two Mon-*

tana Judges Buck the U.S. Supreme Court, 82 A.B.A. J., Oct. 1996, at 16.

b. Nor was *Casarotto* the end of the matter. Seven years later, the Montana Supreme Court signaled that it intends to strike down *any* meaningful arbitration agreement. In *Kloss* v. *Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002), the court considered a challenge to an arbitration agreement under both the reasonable expectations and unconscionability doctrines. Again expressing unabashed hostility to arbitration, the court stated:

> [T]he arbitration provision by which Kloss waived her right of access to this State's courts, her right to a jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal were clearly not within Kloss' reasonable expectations.

Id. at 8. While couching its decision in the language of "reasonable expectations," the court never discussed the form of the contract or the manner in which the arbitration provision was presented to Kloss. This suggests that, in the court's view, "the problem with the provision was its substance rather than its form" and that "the court was really analyzing it under the doctrine of unconscionability and effectively determining that all arbitration clauses are unconscionable." Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 195 (2005).

Indeed, the *Kloss* opinion discusses the unconscionability issue and makes clear that few if any arbitration agreements will ever pass muster under the

court's analysis. Although the court had no reason to reach the unconscionability issue after finding that the arbitration provision violated Kloss's reasonable expectations, the opinion nonetheless offers up "a guide to future litigants who raise the issue of conscionability in the context of arbitration provisions." *Kloss*, 54 P.3d at 8. Among the factors identified by the court are the opportunity to conduct discovery. *Id.* at 8–9. But one of the primary purposes of arbitration is to avoid costly and elaborate discovery procedures. See *Gilmer*, 500 U.S. at 31. Moreover, the factors cited by the court as violating Kloss's reasonable expectations—her state constitutional rights to trial by jury, to conduct discovery, and to seek appellate review (54 P.3d at 8–9)—are, together with these unconscionability factors, "simply descriptive of arbitration" (Burnham, *supra*, at 196). In short, under the Montana Supreme Court's standard, no arbitration agreement will be enforced by the Montana state courts unless it provides for all of the procedural hallmarks that distinguish arbitration from a full-on civil trial.

Even more alarmingly, Justice Nelson, joined by three other justices, issued a separate opinion in *Kloss* that resurrected several themes from the court's *Casarotto* opinions—the very same decisions that this Court rejected in *Casarotto III*—as "an additional rationale supporting [its] decision in th[e] case." 54 P.3d at 11 (Nelson, J., specially concurring). Citing *Casarotto I*, Justice Nelson accused "large national and multi-national corporations" of "effectively privatizing an important segment of the civil justice system." *Id.* at 13–14. And looking to the Montana Constitution, the court insisted that state-law rights to a jury trial and to access to the courts are "sacred[,] * * * inviolable[,] * * * [and] fundamental" (*id.*

at 12–13), and, apparently in the view of the concurring justice, paramount to federal law. Such a view clearly violates this Court's decision in *Casarotto III*. Cf. Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1016 (1996) ("Justice Trieweiler could not have avoided FAA preemption by labeling the reasoning * * * used in [*Casarotto I*] 'unconscionability,' instead of 'Montana Code section 27-5-114(4).'").

As these decisions make clear, the Montana Supreme Court is extremely hostile to arbitration, and it has little intention of faithfully applying the FAA or this Court's decisions. Even after its *Casarotto* decisions were reversed by this Court, the Montana court has invented new ways to circumvent the clear direction of this Court and strike down arbitration agreements that fall squarely within the FAA's protections. In light of this persistent hostility to arbitration in Montana state court, it is apparent that parties seeking to enforce valid arbitration agreements in that State will be able to do so only if they have access to federal court.

2. ***California.*** Like Montana, California also has actively resisted the liberal federal policy favoring arbitration. First, the California Legislature tried to make claims under the Franchise Investment Law non-arbitrable. This Court held that the FAA preempts such efforts. *Southland*, 465 U.S. at 10. Next, the Legislature tried to place certain wage-collection claims under the California Labor Code off limits to arbitration. This Court struck down that effort too. *Perry*, 482 U.S. at 491.

And just last Term, this Court had to reverse a decision of the California Court of Appeal that re-

fused to enforce an arbitration agreement, this time on the ground that a state statute vested exclusive jurisdiction over the dispute in an administrative agency. *Preston*, 128 S. Ct. at 987. This Court was forced to grant certiorari to correct the California court even though a straightforward application of *Buckeye*, 546 U.S. 440, "largely, if not entirely, resolve[d]" the question presented. 128 S. Ct. at 984. Applying *Buckeye*, the Court "disapprove[d] the distinction between judicial and administrative proceedings * * * adopted by the [California] court," explaining that "[w]hen parties agree to arbitrate * * *, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 987.[2]

Despite such rulings by this Court, the California courts' hostility to arbitration remains undeterred. For example, the California Supreme Court has held that claims for so-called "public" injunctive relief under the state Consumer Legal Remedies Act (CLRA) and Unfair Competition Law (UCL) are non-arbitrable. See *Cruz* v. *PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1159 (Cal. 2003) (UCL); *Broughton* v. *Cigna Healthplans of Cal.*, 988 P.2d 67, 71 (Cal. 1999) (CLRA). During the same time frame, it held that discrimination claims brought under the state Fair Employment and Housing Act are arbitrable

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[2] In *Buckeye* itself, this Court reversed a decision of the Florida Supreme Court because that court had failed to follow long-established precedent: "*Prima Paint* and *Southland* answer the question presented here * * *. So also here, we cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law[.]'" *Buckeye*, 546 U.S. at 445–446 (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967)).

only if the arbitration agreement in question provides for, among other things, "more than minimal" discovery and a written ruling. *Armendariz* v. *Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 682–689 (Cal. 2000).

Armendariz also imposed a special "mutuality" requirement on arbitration provisions, holding that an agreement that requires one party but not the other to arbitrate all claims will be deemed substantively unconscionable unless the party seeking to enforce it can prove a "reasonable justification for such one-sidedness based on 'business realities.'" *Id.* at 692."[3] California state courts have employed this standard—albeit solely in the context of arbitration—to strike down a wide variety of arbitration agreements. See, *e.g.*, *Flores* v. *TransAmerica Homefirst, Inc.*, 113 Cal. Rptr. 2d. 376 (Ct. App. 2001) (loan agreement); *Bucy* v. *AT&T Wireless Servs., Inc.*, No. A105910, 2005 WL 2404424 (Ct. App. Sept. 30, 2005) (unpublished) (cellular phone service contracts); *Torigian* v. *Michael Cadillac, Inc.*, No. F039900, 2003 WL 21246609 (Cal. Ct. App. May 29, 2003) (unpublished) (automobile sales contract).

Most recently, the California Supreme Court held that in cases involving claims for the failure to pay statutorily required overtime, courts should refuse to enforce an arbitration provision calling for individual arbitration of disputes "if a trial court de-

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[3] To date, while striking down dozens of arbitration agreements on this ground, no California court has ever found the "business realities" exception to be satisfied. See Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 81.

termines * * * that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." *Gentry* v. *Super. Ct.*, 165 P.3d 556, 559 (Cal. 2007), *cert. denied sub nom. Circuit City Stores, Inc.* v. *Gentry*, 128 S. Ct. 1743 (2008). Incredibly, the court strongly implied that the arbitration agreement at issue was unenforceable as a matter of public policy even though it was "set forth in a package of written materials, which [the employee] received, and [was] further explained in a video presentation, which he attended"; the employer "suggested that he could consult with an attorney about his legal rights"; and, finally, the employee was given 30 days to "opt out" of the arbitration program, without penalty. *Id.* at 576 (Baxter, J., dissenting).

The same mistaken premise underlies *Cruz*, *Broughton*, *Armendariz*, and *Gentry*: that a state is free to declare certain disputes or claims to be nonarbitrable as a matter of public policy—or to impose conditions on the enforcement of arbitration provisions—whenever it believes that such conditions are necessary to advance "unwaivable statutory rights" (*Gentry*, 165 P.3d at 559). According to the California Supreme Court, this Court has acknowledged that if there is an "inherent conflict" between arbitration and a statute's underlying purpose, a dispute or claim under that statute may be declared nonarbitrable. *Broughton*, 988 P.2d at 73–74. What it persistently has overlooked (despite being repeatedly advised), however, is that this premise is valid only when the statute is a *federal* one and that only *Congress*—not the State of California—has the constitutional authority to displace the FAA. See *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S.79, 90 (2000); *Gil-*

mer, 500 U.S. at 26; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985).

By contrast, some federal district courts in California have correctly concluded that *Broughton* and *Cruz* are preempted because the FAA precludes the State from "declar[ing], through the nature of the remedies * * * offer[ed] in a statute, that it [does] not wish to have certain claims subjected to arbitration." *Arriaga* v. *Cross Country Bank*, 163 F. Supp. 2d 1189, 1198–1199 (S.D. Cal. 2001), *overruled on other grounds by Ingle* v. *Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *accord, e.g.*, *Lozano* v. *AT&T Wireless*, 216 F. Supp. 2d 1071, 1076 (C.D. Cal. 2002), *overruled on other grounds by Ingle*, 328 F.3d 1165. These cases well demonstrate that a federal forum can make a difference as to whether an arbitration agreement will be enforced in California.

California courts have also relied on a unique version of the unconscionability doctrine to refuse to enforce arbitration provisions in a variety of circumstances. Several decisions, for example, have declared arbitration agreements to be procedurally unconscionable "even if the weaker party could reject the terms and go elsewhere." *Villa Milano Homeowners Ass'n* v. *Il Davorge*, 102 Cal. Rptr. 2d 1, 5–6 (Ct. App. 2000).[4] By contrast, California courts have repeatedly held—outside the context of arbitration—that a contract provision is not procedurally uncon-

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[4] See also, *e.g.*, *Gatton* v. *T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 353–356 (Ct. App. 2007), *cert. denied*, 128 S. Ct. 2501 (2008); *Szetela* v. *Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002).

scionable if reasonable market alternatives are available.[5]

Other decisions have found arbitration provisions procedurally unconscionable even when the party resisting arbitration had "considerable bargaining strength." See *Graham* v. *Scissor-Tail, Inc.*, 623 P.2d 165, 171, 180 (Cal. 1971) (refusing to enforce arbitration agreement in contract signed by Bill Graham, the famous rock music impresario); *Stirlen* v. *Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 146 (Ct. App. 1997) (finding procedural unconscionability in arbitration agreement accepted by "successful and sophisticated corporate executive" who was "sought out" by other companies). And like the Montana Supreme Court, several California courts have found even the most basic elements of arbitration to be substantively unconscionable. See, *e.g.*, *O'Hare* v. *Mun. Resource Consultants*, 132 Cal. Rptr. 2d 116 (Ct. App. 2003) (holding standard American Arbitration Association rules to be unconscionable because they limit discovery and direct parties to share the costs of arbitration).

As these decisions illustrate, California state courts have shown a tremendous hostility to arbitration agreements. Indeed, one recent study that reviewed California state-court decisions from 1982 to 2006 found that unconscionability challenges to arbitration agreements were successful in 58 percent of

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[5] See *Belton* v. *Comcast Cable Holdings, LLC*, 60 Cal. Rptr. 3d 631, 650 (Ct. App. 2007); *Wayne* v. *Staples, Inc.*, 37 Cal. Rptr. 3d 544, 556 (Ct. App. 2006); *Aron* v. *U-Haul Co.*, 49 Cal. Rptr. 3d 555, 564 (Ct. App. 2006); *Morris* v. *Redwood Empire Bancorp*, 27 Cal. Rptr. 3d 797, 807 (Ct. App. 2005); *Dean Witter Reynolds, Inc.* v. *Super. Ct.*, 259 Cal. Rptr. 789, 795 (Ct. App. 1989).

all cases, whereas unconscionability challenges to other contract provisions succeeded only 11 percent of the time. See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44–48 (2006). That study echoes, and if anything, amplifies, the results of an earlier analysis that found that courts are twice as likely to find arbitration agreements unconscionable as they are other types of contract provisions, and that "a significant number of these cases" are from California. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–195 (2004). The cumulative effect of such decisions is that businesses find it nearly impossible to enforce their arbitration agreements in California state courts.

3. ***West Virginia.*** The West Virginia Supreme Court of Appeals repeatedly has sought to undermine national laws that further important commercial policies, and the "liberal federal policy favoring arbitration agreements" (*Moses H. Cone*, 460 U.S. at 24) has been no exception. For example, in one notorious product liability case, that court unanimously declared that it would adopt "the rule most favorable to the plaintiff' on the extraordinary basis that "for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense." *Blankenship* v. *Gen. Motors Corp.*, 406 S.E.2d 781, 786 (W. Va. 1991).

a. Consistent with this rhetoric, and in clear violation of the FAA, the West Virginia high court refuses to enforce any arbitration agreement against state consumers unless the arbitration procedures are the equivalent of a full civil trial. See *State ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265 (W. Va. 2002). In *Dunlap*, the court refused to enforce an arbitration agreement because it required arbitration on an individual basis and did not authorize punitive damages. In the course of its opinion, the court strongly implied that, based on state constitutional rights to a trial by jury and access to the courts, it would not enforce *any* arbitration agreement, absent proof of a "knowing and intelligent waiver" of those rights (a signed agreement apparently being insufficient to establish the requisite knowledge and intelligence). See *id.* at 276–277 & n.7. The court, however, reserved decision on this issue because it found other reasons not to enforce the arbitration agreement. *Id.* at 277.

The West Virginia Supreme Court of Appeals has also held broadly that claims under that State's employment discrimination statute are not arbitrable. *Copley* v. *NCR Corp.*, 394 S.E.2d 751, 755–756 (W. Va. 1990). Such a ruling is, of course, in direct contradiction to this Court's command that, "[h]aving made the bargain to arbitrate, [a] party should be held to it unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628 (emphasis added); *accord, e.g.*, *Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26.

b. Because the West Virginia state courts have refused to give effect to FAA preemption of state law, the outcome of a petition to compel arbitration in West Virginia will often depend solely on whether

the petition is filed in state or federal court. Both of West Virginia's district courts have repudiated *Dunlap* and declared its limits on arbitration preempted by the FAA. For example, Chief Judge Faber of the Southern District of West Virginia has held that *Dunlap* violates the FAA by "impos[ing] * * * heightened requirements on the enforcement of agreements to arbitrate." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Coe*, 313 F. Supp. 2d 603, 612 (S.D. W. Va. 2004). Chief Judge Faber explained that to the extent *Dunlap* "imposes heightened requirements on 'agreements that waive rights under the Rules of Civil Procedure,'" the decision "would necessarily impose heightened requirements on 'agreements to not submit claims to the Rules of Civil Procedure'—and this would obstruct agreements to resolve claims in an arbitral forum instead of a court." *Id.* at 615. While such a rule would not target "'arbitration' * * * as an abstract matter," it would nonetheless be preempted because it would have the impermissible "effect of placing agreements to arbitrate * * * on a different footing than other contracts." *Ibid.*

The *Coe* court's reasoning has been adopted by other federal judges in West Virginia. For example, Judge Stamp of the Northern District of West Virginia "agree[d] with [*Coe*'s] analysis[] and [ruled] that the holding in *Dunlap* [was] preempted by the FAA" to the extent that it invalidated agreements to arbitrate individually rather than as part of a class. *Schultz* v. *AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005); see also *Miller* v. *Equifirst Corp.*, No. 2:00-0335, 2006 WL 2571634, at *16 n.12 (S.D. W. Va. Sept. 5, 2006) (tentatively agreeing with *Schultz* that "the FAA preempts *Dunlap* to the extent [*Dunlap*] would invalidate

plaintiff's waiver of the right to pursue class action relief").

The Fourth Circuit likewise has denounced both *Dunlap* and *Copley*. See *Am. Gen. Life & Accident Ins. Co.* v. *Wood*, 429 F.3d 83, 87–91 (4th Cir. 2005). Although the party resisting arbitration in *Wood* sought to rely on *Dunlap*'s discussion of state constitutional rights to a trial by jury and access to the courts, as well as *Copley*'s holding that state-law discrimination claims are non-arbitrable, the Fourth Circuit properly held that this precedent "must be necessarily circumscribed" in light of the FAA, as interpreted by this Court. *Id.* at 90. The Fourth Circuit then criticized *Dunlap* for failing to adhere to the FAA and this Court's decisions: "To the extent that *Dunlap* intends to fashion a broad prohibition against the arbitrability of state-law claims," the court admonished, "such a ruling, whether dicta or otherwise, cannot contravene the FAA." *Ibid.* The court also noted that it had already rejected *Copley* as preempted. *Ibid.*

Nevertheless, West Virginia state courts continue to adhere to *Dunlap* rather than to clear direction from Congress and this Court. See, *e.g.*, *Cummins* v. *H&R Block, Inc.*, No. 03-C-134, 2004 WL 5362608 (W. Va. Cir. Ct. June 1, 2004) (relying on *Dunlap* to find arbitration provision unenforceable because it does not provide for class action or recovery of attorneys' fees), *cert. denied*, 543 U.S. 1148 (2005). And the West Virginia Supreme Court of Appeals continues to cite favorably to the *Dunlap* standard for attacking arbitration clauses under state law. See, *e.g.*, *State ex rel. Saylor* v. *Wilkes*, 613 S.E.2d 914, 921 (W. Va. 2005); *State ex rel. Wells* v. *Matish*, 600 S.E.2d 583, 588–589 (W. Va. 2004) (per

curiam). Because the West Virginia state courts' hostility to arbitration shows no signs of abating, West Virginia litigants will often be unable to enforce valid arbitration agreements under the FAA unless they can invoke the jurisdiction of the federal courts.

4. ***Pennsylvania.*** A similar rift has recently arisen between the Third Circuit and the Pennsylvania state courts. In a 2002 decision, the Pennsylvania intermediate court of appeals held that an agreement to arbitrate individually (rather than as part of a class) is unconscionable under Pennsylvania law when damages are small. *Lytle* v. *CitiFinancial Servs., Inc.*, 810 A.2d 643, 665–666 (Pa. Super. Ct. 2002).[6] Referring to the litigation before it as "yet another vignette in the timeless and constant effort by the *haves* to squeeze from the *have nots* even the last drop," the *Lytle* court made no effort to conceal its clear contempt for arbitration and the business community, declaring that "*if it's good for the power-*

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[6] A separate holding in *Lytle* has since been abrogated by the Pennsylvania Supreme Court. That portion of the *Lytle* decision concluded that "the reservation by [the stronger party] of access to the courts for itself to the exclusion of the consumer creates a *presumption of unconscionability* * * * in the absence of 'business realities' that *compel* inclusion of such a provision * * *." 810 A.2d at 665 (first emphasis added). Reviewing this holding in a later case, the Pennsylvania Supreme Court concluded that this presumption "was well intentioned in its effort to guard against pernicious lending practices * * * [but] it swept too broadly." *Salley* v. *Option One Mortgage Corp.*, 925 A.2d 115, 129 (Pa. 2007). The *Salley* court rejected any strict presumption and clarified that "the burden of establishing unconscionability lies with the party seeking to invalidate a contract." *Ibid.* But *Salley* did not directly address the portion of *Lytle* concerning the waiver of class action procedures. *Gay* v. *CreditInform*, 511 F.3d 369, 393 n.18 (3d Cir. 2007) (noting that *Salley* concerns "a very different context from that here").

ful, it's bad for the people." *Id.* at 658 n.8. After decrying "the influence, if not the domination of the *haves* upon the election process by reason of *the haves*['] profligate, even unwholesome, financing of both the *selection* and the *election* of candidates" (*ibid.*), the court criticized Congress for declining to restrict the scope of the FAA and denounced businesses seeking the benefits of arbitration as "pinstriped exploiters." *Id.* at 660–661. Following its lengthy diatribe against arbitration, the *Lytle* court decreed that "class actions are favored in this Commonwealth as a means of resolving many meritorious claims which would otherwise, due to the amounts involved, escape prosecution" (*id.* at 655) and remanded the case to the trial court to conduct additional fact-finding and reconsider the contract in light of these new instructions (*id.* at 666).

A second Pennsylvania case likewise refused to enforce an agreement that required arbitration on an individual basis, relying heavily on *Lytle* to conclude that these agreements must be unconscionable because "[i]t is only the class action vehicle which makes small consumer litigation possible." *Thibodeau* v. *Comcast Corp.*, 912 A.2d 874, 885 (Pa. Super. Ct. 2006).

The Third Circuit has expressly refused to follow these Pennsylvania cases, explaining that it would enforce such arbitration agreements "largely because federal law requires that we do so[,] and Pennsylvania law must conform with federal law." *Gay* v. *CreditInform*, 511 F.3d 369, 392 (3d Cir. 2007). The court correctly recognized that state-court attempts to cloak their hostility to arbitration in the language of "unconscionability" are frequently mere pretext and that "[i]t would be sophistry to contend * * * that

the Pennsylvania cases do not rely on the uniqueness of an agreement to arbitrate." *Id.* at 395 (internal quotation marks omitted). That is, while "the Pennsylvania cases are written ostensibly to apply general principles of contract law, they hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Ibid.* Accordingly, the court held that it would "not apply state law as explicated in *Lytle* and *Thibodeau* and thereby interfere with"—and "significant[ly] narrow[]"—"the appropriate application of the FAA." *Ibid.*

B. Respondents' reading of Section 4 would further the FAA's underlying policies and purposes and counteract state-court hostility to arbitration.

As the foregoing state-court decisions show, more than eighty years after the FAA's enactment there remains significant hostility to arbitration in the state courts. As a consequence, litigants seeking to enforce valid arbitration agreements under the FAA will in many instances be denied relief unless a federal forum is available.

In theory, this Court could grant certiorari in each case evidencing such hostility and repeatedly reinstruct state courts on the proper application of federal law. In practice, however, such an approach would be unworkable. And even if it were practical, it would still undermine the benefits of arbitration because it would require lengthy and expensive appeals to enforce arbitration agreements—all in direct "contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible'" (*Preston*,

128 S. Ct. at 986 (quoting *Moses H. Cone*, 460 U.S. at 22)). Moreover, as experience shows, state courts will continue to devise new pretextual grounds for continuing to deny the enforcement of many valid arbitration agreements.

But the FAA's framers already provided a simple and effective solution for overcoming much of the state-court hostility to arbitration. They recognized that judicial hostility to arbitration was pervasive, and their primary purpose was to overcome such attitudes. *Buckeye*, 540 U.S. at 443 ("[t]o overcome judicial resistance to arbitration, Congress enacted the [FAA]"); see also *Allied-Bruce*, 513 U.S. at 270 ("the basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"); *Gilmer*, 500 U.S. at 24. Differential treatment of arbitration by state and federal courts is something the framers of the FAA easily could have predicted, and it is thus no wonder that the plain language of Section 4 allows parties in many cases to bring a petition to compel arbitration in federal, rather than state, court.

While petitioner would have this Court "relegate[] [Section 4] to a curiosity" (Respondents' Br. at 3) it is clear that the language of Section 4 is not nearly so narrow as she would have it. Rather, that provision, understood in light of the principal purpose of the FAA, calls for federal courts to look to the "subject matter of a suit arising out of the controversy between the parties" for purposes of determining jurisdiction. 9 U.S.C. § 4. This gives parties to disputes involving federal law the option of avoiding potentially hostile state courts and vindicating their federal rights to compel arbitration in a federal forum. Cf. *England* v. *La. State Bd. of Med. Examin-*

ers, 375 U.S. 411, 415 (1964) ("There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.").[7]

In short, proper respect for the important federal policies behind the FAA strongly counsels in favor of construing the Act to permit federal courts to exercise jurisdiction over a petition to compel arbitration by looking to the nature of the underlying dispute to be arbitrated. Thus, the court of appeals' decision is supported not only by the plain language of the statute, but also by the important federal policies underlying the FAA.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

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[7] We note that Justice Thomas has thus far adhered to the view that the FAA applies only in federal courts, not in state courts. See, *e.g.*, *Preston*, 128 S. Ct. at 989 (Thomas, J., dissenting); *Allied-Bruce*, 513 U.S. at 285–297 (Thomas, J., dissenting). Although the rest of the Court has rejected that view, there can be no denying that adopting respondents' reading would cause the issue that has concerned Justice Thomas to arise less frequently.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Case No. 07-773

IN THE

Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTEREST OF *AMICUS CURIAE*

Amicus Cintas Corporation ("Cintas") has an interest in this case because the first question presented here is also presented in a case now pending in the United States Court of Appeals for the Ninth Circuit, *Cintas Corp. v. Abel*, No. 07-16318, to which Cintas is a party, arising from proceedings in 70 district courts nationwide.[1] The *Cintas* case was taken under submission by the Ninth Circuit in December 2007 after briefing and oral argument. In April 2008, the Ninth Circuit withdrew the submission and deferred resolution of the case pending the issuance of this Court's decision in *Vaden*. The Court's decision here is likely to determine or substantially affect the outcome of the Ninth Circuit appeal.[2]

The *Cintas* case has its genesis in a federal class action and collective action lawsuit filed under federal question jurisdiction in the Northern District of California, *Veliz v. Cintas Corp.*, No. C-03-1180-SBA. The plaintiffs in *Veliz* seek overtime premiums under Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), and other relief under federal and state law. Cintas moved under Section 3

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[1] No counsel for a party authored any part of this brief. Neither counsel for a party nor a party made any monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of the brief. *See* Letter from Carter G. Phillips and Daniel R. Ortiz to the Hon. William K. Suter (July 22, 2008).

[2] Cintas petitioned the Court for a writ of certiorari before judgment so that the Ninth Circuit case could be considered together with *Vaden*. That petition, No. 07-1338, was denied on June 16, 2008.

of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, to stay the litigation as to approximately 1,900 opt-in plaintiffs who had signed agreements requiring disputes to be resolved by arbitration held in the county and state where they work, or last worked, for Cintas. The district court granted the motion.

In accordance with the place-of-arbitration term in each of the 1,900 plaintiffs' arbitration agreements, Cintas filed petitions to compel arbitration in the 70 federal judicial districts where these plaintiffs worked or last worked for Cintas.[3] The Judicial Panel on Multidistrict Litigation eventually transferred Cintas' 70 petitions to the *Veliz* court for coordinated or consolidated pretrial proceedings to determine whether, within the meaning of 9 U.S.C. § 4, the plaintiffs were failing, neglecting, or refusing to arbitrate in accordance with the terms of their written arbitration agreements.

In the course of those proceedings, the plaintiffs argued that the federal courts lacked subject-matter jurisdiction over Cintas' petitions, even though the claims that Cintas sought to have arbitrated were the very federal question claims that the respondents (as plaintiffs in *Veliz*) had first brought in litigation in federal court. The district court rejected that argument and ruled for Cintas. *In re*

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[3] Cintas did not move under Section 4 of the FAA to compel arbitration as to the 1,900 plaintiffs because the district court had indicated previously that it lacked the power to order arbitration outside the Northern District of California. *See* 9 U.S.C. § 4 ("The hearings and proceedings, under such [arbitration] agreement, shall be within the district in which the petition for an order directing such arbitration is filed.").

Cintas Corp. Overtime Pay Arbitration Litigation, 2007 WL 1089695 (N.D. Cal. Apr. 11, 2007). Then the district court certified, and the Ninth Circuit allowed, an interlocutory appeal under 28 U.S.C. § 1292(b) on the issue of subject-matter jurisdiction. *See In re Cintas Corp. Overtime Pay Arbitration Litigation*, 2007 WL 1302496 (N.D. Cal. May 2, 2007); *Cintas Corp. v. Abel*, No. 07-80046, Order (9th Cir. July 24, 2007).

The case was taken under submission by the Ninth Circuit on December 3, 2007. On March 17, 2008, this Court granted the petition for a writ of certiorari in *Vaden*. The Ninth Circuit then withdrew the submission of *Cintas* and deferred the case pending the issuance of the Court's decision here. *Cintas Corp. v. Abel*, No. 07-16318, Order (9th Cir. Apr. 7, 2008).

The Court's decision may affect not only the Ninth Circuit proceeding in *Cintas*, but thereby the underlying litigation throughout the country in which Cintas seeks federal enforcement of agreements to arbitrate federal question claims. Cintas respectfully requests that this Court consider Cintas' perspective in this case, in order to appreciate the full consequences of the rule that Petitioner invites the Court to adopt.

SUMMARY OF ARGUMENT

By its plain language, Section 4 of the FAA authorizes a federal court to enforce an agreement to arbitrate whenever the dispute to be arbitrated would fall within the court's subject-matter jurisdiction. The phrase "any United States district

court which, save for such agreement, would have jurisdiction" recognizes that the court's jurisdiction over the underlying dispute is merely theoretical in light of the agreement to arbitrate. "[U]nder Title 28" signifies that jurisdiction over the underlying dispute may spring from any of the full range of federal jurisdictional provisions, including 28 U.S.C. § 1331. Finally, "of the subject matter of a suit arising out of the controversy between the parties" specifies that it is jurisdiction over the dispute to be arbitrated that allows a federal court to enforce an agreement to arbitrate.

Because the Section 4 mechanism for enforcement of arbitration agreements is available only as to controversies that are within federal subject-matter jurisdiction, Section 4 does not create any independent jurisdiction. Instead, jurisdiction over a Section 4 petition derives from jurisdiction the court would have over the underlying dispute.

Applying Section 4 according to its terms serves the federal policy favoring enforcement of arbitration agreements. An interpretation contrary to that of the Fourth Circuit will in many cases deny parties recourse to the federal courts for enforcement of agreements to arbitrate federal claims. The effect of such a rule is more pronounced in light of the fact that many states view Section 4 as inapplicable in state court and state arbitration regimes may not provide enforcement mechanisms as broad as their federal counterpart. Subjecting cases such as *Cintas* to a multitude of state procedural regimes would not only reward the forum-shopping tactics of those seeking to avoid arbitration in accordance with the terms of their written agreements, but it would also

likely yield inconsistent results – and results antithetical to the FAA.

ARGUMENT

I. The Plain Language of FAA Section 4 Provides that a Federal Court May Hear a Petition to Compel Arbitration If the Court Would Have Jurisdiction Over the Subject Matter of the Underlying Dispute.

Section 4 creates a federal remedy to enforce written agreements to arbitrate. It also describes the circumstances in which a court may hear a petition invoking that remedy. The statutory language at issue in this case provides that a Section 4 petition to compel arbitration may be filed before:

> any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties.

9 U.S.C. § 4. The Court's analysis of the first question presented – whether FAA Section 4 authorizes a federal court to hear a petition to compel arbitration whenever the dispute to be arbitrated arises under federal law – must begin with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

Section 4 allows a district court to hear a petition for arbitration if, "save for" the arbitration agreement, the court "would have jurisdiction under Title 28" over "the subject matter of a suit arising

out of the controversy between the parties." Read naturally, the statute provides that if a district court would have subject-matter jurisdiction over the parties' substantive dispute (absent the arbitration agreement), the court can hear a petition to compel arbitration of that dispute. It allows federal courts to compel arbitration of any dispute that they would otherwise be able to entertain on the merits. *Discover Bank v. Vaden*, 396 F.3d 366, 369-70 (4th Cir. 2005); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999). A close analysis of each key phrase of this clause confirms that plain language reading.

A. "[A]ny United States district court which, save for such agreement, would have jurisdiction"

Section 4 requires a federal court to consider whether it would have jurisdiction if the case were brought in a different posture (not unlike evaluating jurisdiction over a claim for declaratory judgment). The conditional phrase "would have jurisdiction" demonstrates that the court must consider its jurisdiction over a proceeding other than the one before it. This means that jurisdiction over a Section 4 petition is dependent; it flows from jurisdiction over something else.

Before identifying the "something else" over which the court must have jurisdiction in order to hear a petition to compel arbitration, the statute establishes a key characteristic of the dispute under consideration: there is no agreement to arbitrate. The words it uses to accomplish this purpose are "save for such agreement." Thus, "save for" the

parties' agreement to arbitrate, there would be a controversy over which the court would have jurisdiction.

With this language, the statute asks the court to "set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently." *Vaden*, 396 F.3d at 369. The text emphasizes the connection between the "save for" and "would have" phrases by using commas to set them apart from the rest of the sentence: ". . . which, save for such agreement, would have jurisdiction under Title 28, in a civil suit . . . ." The two phrases work in tandem to ask the court to "look through" the petition to see whether there would be an independent basis for federal jurisdiction in the underlying controversy between the parties.

Any reading that eliminates the connection between these two phrases does violence to the statutory text. Section 4 asks the court to inquire "would there be jurisdiction if . . . ," and then fills in the blank. Petitioner argues that Congress meant to fill in the blank with "the ouster doctrine were nullified." As a matter of textual interpretation, this cannot be right. First, the ouster doctrine already *was* nullified in Section 2 of FAA, 9 U.S.C. § 2, a fact that renders unnecessary a theoretical inquiry into jurisdiction absent the ouster doctrine. Second, the words of the statute – "save for such agreement" – cannot be contorted into an expression of the demise of the ouster doctrine. Their plain meaning is "but for the arbitration agreement," not "if the arbitration agreement were enforceable." Thus, Section 4 does not ask the court to consider its jurisdiction as if there were no ouster doctrine, it asks the court to

consider its jurisdiction as if there were no arbitration agreement.

B. "[U]nder Title 28"

The statute next establishes the sources of jurisdiction that a court may consider in its jurisdictional inquiry. The phrase "under Title 28" conveys the full range of federal jurisdictional provisions, including 28 U.S.C. § 1331, the section conferring federal question jurisdiction. Originally, Section 4 referred to "the judicial code" rather than Title 28. Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883. The Judicial Code included all types of federal jurisdiction, including federal question jurisdiction. Act of Mar. 3, 1911, Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1091 ("The district courts shall have original jurisdiction . . . where the amount in controversy exceeds . . . the sum or value of three thousand dollars and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, or (b) is between citizens of different States."). As part of the post-World War II recodification of federal statutes into the various Titles of the United States Code, when Congress amended Section 4 to read "under Title 28," it specifically cited 28 U.S.C. § 1331 as an example of the provisions encompassed by the phrase "Title 28." *See* S. Rep. No. 83-2498, at 8 (1954), as reprinted in 1954 U.S.C.C.A.N. 3991, 3998 ("'Title 28, in a civil action' was substituted for 'the judicial code at law, in equity.' . . . That title sets out the general jurisdiction of district courts in civil and admiralty matters. See section 1331 et seq., thereof.").

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983), this Court specifically approved of "*Commercial Metals Co. v. Balfour, Guthrie, & Co.*, 577 F.2d 264, 268-269 (CA5 1978) and cases cited" therein. One of those "cases cited" is *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 408 (2d Cir. 1959), where the court held that "jurisdiction under . . . Section 4 may doubtless in some instances be federal question jurisdiction, based upon rights alleged to arise out of some federal statute other than the Arbitration Act." *Robert Lawrence Co.*, 271 F.2d at 408. That is exactly the situation in *Cintas* – jurisdiction under Section 4 is federal question jurisdiction, based upon rights alleged to arise out of a federal statute (the FLSA) other than the FAA.

Petitioner posits that Congress intended there to be federal question jurisdiction over a Section 4 petition only when the petition independently arises under federal law, such as when a federal statute requires arbitration. (Pet. Br. at 29-30). But congressionally mandated arbitration sits apart from Section 4, because Section 4 only compels arbitration "under a written agreement for arbitration." The FAA's avowed intent is to ensure that "*private* agreements to arbitrate" are enforced. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989) (emphasis added). If Congress, by statutory command, requires arbitration, it is questionable whether such a matter could even fall within the purview of Section 4 absent a written agreement incorporating the relevant statute. And even if Section 4 were applicable to statutory arbitration, there is no reason why the existence of this isolated

jurisdictional path should block "look through" jurisdiction. The statutory arbitration provisions featured by Petitioner were all enacted well after the 1925 enactment of the FAA. *See, e.g.*, Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1239 (Sept. 16, 1980). Congress did not include the broad provision in Section 4 just in case, someday many years later, it might provide for arbitration by statute.

C. "[O]f the subject matter of a suit arising out of the controversy between the parties"

As explained above, Section 4 requires a federal court to consider its jurisdiction, under the full range of federal jurisdictional provisions, as if there were no arbitration agreement. The phrase "subject matter of a suit arising out of the controversy between the parties" identifies the "something else" over which a court must have jurisdiction in order to hear a petition to compel arbitration. This makes perfect sense, because such a suit is exactly what would be presented to the court if there were no agreement to arbitrate.

In this context, "controversy" can only mean the parties' substantive dispute. This Court has already embraced that plain meaning of the statute, explaining that "Section 4 provides for an order compelling arbitration only when the federal district court *would have jurisdiction over a suit on the underlying dispute . . .*" *Moses H. Cone*, 460 U.S. at 25 n.32 (emphasis added). Petitioner ignores that portion of the *Moses H. Cone* decision.

The FAA consistently uses the word "controversy" to refer to the parties' dispute over their substantive rights and obligations. Section 2 addresses the enforceability of a written agreement "to settle by arbitration a controversy arising out of" a contract. 9 U.S.C. § 2. "Controversy" has the same meaning in Section 1 ("matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction"), Section 5 ("upon the application of either party to the controversy the court shall designate and appoint an arbitrator"), Section 10 ("[w]here the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy"), and Section 11 ("[w]here the award is imperfect in matter of form not affecting the merits of the controversy"). 9 U.S.C. §§ 1, 5, 10, 11. It would be strange indeed for Congress to use "controversy" to mean the parties' substantive dispute everywhere except Section 4. *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (recognizing "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (internal quotation marks omitted).

The structure of Section 4 validates this straightforward reading. The section begins by stating that it only applies where there is some "failure, neglect, or refusal" to arbitrate. It makes no sense to require a court to analyze whether it would have jurisdiction over the subject matter of the parties' controversy (or to set aside the arbitration agreement), if the controversy *itself* were the refusal to arbitrate. There would be no need for any of the

provisions discussed above; the statute could simply state that a petition may be filed in a court "which would have jurisdiction in a civil action over the alleged failure, neglect, or refusal to arbitrate." Congress knew how to refer to the subject matter of the petition itself; it did not need to use "subject matter . . . controversy" language to do that.

As recently as in her petition for a writ of certiorari, Petitioner argued that the "controversy between the parties" was the dispute over the refusal to arbitrate. (Pet. at 25). Abandoning that argument for an even less plausible one, she now insists that it is "a traditional suit seeking specific performance of a contract." (Pet. Br. at 36). Petitioner maintains that the jurisdictional language in Section 4 can be interpreted by reference to the New York statute, which does not include it. She argues that because New York merged law and equity in 1848, it developed a swift process to enforce some types of arbitral awards by 1920 (Pet. Br. at 35 n.5), and so "the New York drafters merely extended their existing swift process to the new task of compelling arbitration" (*id.* at 34-35). The federal system had no such expedited process prior to the FAA, and Petitioner surmises that the jurisdictional language in Section 4 was meant to inform federal courts (who had no previous experience with such suits) that the FAA should be treated as a specific performance action for purposes of jurisdiction. (*Id.* at 36). Perhaps not surprisingly, Petitioner's theory finds no support in precedent or scholarship.

The argument can be discarded without delving too far into the historical background. First, and most importantly, it does not square with the actual

language of the statute. The phrase "a suit arising out of the controversy between the parties" is certainly a strange way to say "a common-law specific performance action." And if that were the case, there would be no reason to say "save for such agreement" because jurisdiction would be founded directly on the agreement. Second, Petitioner presents nothing beyond speculation to link New York's previous "swift process" to its new arbitration act in the 1920s. Nor is there any support in the legislative history for the theory that Congress intended Section 4 to be merely an extension of existing specific performance law. Third, Petitioner does not contend that New Jersey – the other state whose arbitration statute formed the basis for the FAA – had New York-style, expedited "special proceedings." Indeed, New Jersey did not merge law and equity until 1947. Alan V. Lowenstein, *The Legacy of Arthur T. Vanderbilt to the New Jersey Bar*, 51 Rutgers L. Rev. 1319, 1331 (1999). Yet New Jersey's arbitration act did not have any provision similar to the jurisdictional provisions in Section 4. Act of Mar. 21, 1923, ch. 134, 1923 N.J. Laws 291.

For all of these reasons, Petitioner's interpretation of Section 4 runs afoul of the statutory text. The statute must be given its plain meaning. *BP Am. Prod. Co. v. Burton*, 127 S. Ct. 638, 643 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.").

II. A Petition to Compel Arbitration Under FAA Section 4 Arises Under Federal Law If the Underlying Dispute Arises Under Federal Law.

This Court has long recognized that the FAA "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331." *Moses H. Cone*, 460 U.S. at 25 n.32; *see Vaden*, 396 F.3d at 368. In other words, a Section 4 petition to compel arbitration does not arise under federal law by virtue of being brought pursuant to the FAA. But recognition that the FAA does not create independent jurisdiction is not inconsistent with – indeed, it affirmatively reflects – an understanding that federal jurisdiction over a Section 4 petition derives from federal jurisdiction that would exist as to the underlying dispute. Indeed, in the very footnote where this Court stated that the FAA is not an independent source of jurisdiction, it likewise recognized that a Section 4 petition could be filed when a district court "would have jurisdiction over a suit on the underlying dispute." *Moses H. Cone*, 460 U.S. at 25 n.32.

In establishing Section 4 as a remedy for enforcement of arbitration agreements, Congress was acutely aware of the limits of federal jurisdiction. It did not seek to expand those limits by authorizing federal courts to interfere with disputes that are outside the federal courts' power to decide. Instead, Congress carefully circumscribed the Section 4 remedy, making it available only when the dispute to be arbitrated would fall within the established jurisdiction of the federal courts. *See* 9 U.S.C. § 4; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265,

291 (1995) (Thomas, J., dissenting) ("[F]ederal courts have jurisdiction to enforce arbitration agreements only when they would have had jurisdiction over the underlying dispute."); Legal Developments Significant in Business: The United States Arbitration Law, 4 Harv. Bus. Rev. 236, 237 (1926) ("The new act . . . does not extend in any way the jurisdiction of the Federal Courts, but rather makes arbitration agreements valid and enforceable within their present jurisdiction."). It is precisely this limitation on the availability of the remedy that led the Court to conclude that Section 4 creates no independent jurisdiction. *See Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *Moses H. Cone*, 460 U.S. at 25 n.32. In short, federal courts have no independent federal jurisdiction over Section 4 petitions because their jurisdiction over such petitions derives from, and is limited by, their jurisdiction over the underlying disputes.

This explains why Section 4 does not include language akin to that appearing in Section 203 of the FAA, 9 U.S.C. § 203. *See* Pet. Br. at 37-38 (citing Section 203 as evidence that Congress "knows how to [expand jurisdiction] clearly and unequivocally"). The language in Section 203 was necessary to secure a federal forum, in light of the high likelihood that the dispute would be based on foreign law or have aliens on both sides, otherwise rendering a federal forum unavailable. Because domestic parties to an arbitration agreement had at least two different paths to federal court (diversity or federal question) that Section 4 expressly acknowledged, Congress had no need to "expand" the jurisdictional scope of the FAA in Section 4.

Of course, Congress' deference to existing jurisdictional boundaries in no way suggests that it intended to limit the federal courts' ability to compel arbitration of disputes that would be within their power to decide. As explained in Part I, the plain statutory language evinces an intent to make the Section 4 remedy available whenever, but for the arbitration agreement, the underlying dispute could be sued upon in federal court. Congress provided that federal jurisdiction over a petition to compel arbitration would be coextensive with a federal court's jurisdiction over the underlying dispute. *See Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 24 (1924) (statement of Julius Cohen) ("[T]he Federal Courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would normally have jurisdiction of a controversy between the parties."). *See also Allied-Bruce*, 513 U.S. at 291 (Thomas, J., dissenting) ("[T]he FAA treats arbitration simply as one means of resolving disputes that lie within the jurisdiction of the federal courts."). When a Section 4 petition is brought to compel arbitration of a dispute that arises under federal law, therefore, the petition likewise arises under federal law. *See* Ian R. Macneil, *American Arbitration Law* 219 n.4 (1992) ("[T]he jurisdictional provision of section 4 simply replicated jurisdiction the courts would have had in the absence of an arbitration agreement.").

Thus, Section 4 conceives of a petition to compel arbitration as an adjunct, jurisdictionally, to a dispute over which the federal courts would have jurisdiction. Section 4 petitions are routinely viewed in that manner when brought as so-called "embedded" petitions – *i.e.*, motions to compel filed after the other party has initiated litigation in federal court. Neither the text nor the history of Section 4 provides any basis for viewing an "independent" Section 4 petition differently. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87-89 (2000) (rejecting distinction between "independent" and "embedded" for purposes of assessing appellate jurisdiction under the FAA). To the contrary, the statute makes federal jurisdiction over a petition dependent on whether there would be federal jurisdiction over the underlying dispute – not on whether the party resisting arbitration has actually presented the dispute to a federal court.

Petitioner argues that this Court's decisions in *Mesa v. California*, 489 U.S. 121 (1989), and *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), conflict with the *Vaden* court's recognition that jurisdiction over a Section 4 petition derives from jurisdiction over the underlying dispute. *Mesa*, however, had nothing to do with derivative, or "look-through," jurisdiction, and *Kokkonen* is readily distinguishable. In *Kokkonen*, the Court held that a federal court does not have jurisdiction over a motion to enforce a settlement agreement by virtue of its jurisdiction over the settled lawsuit. *Kokkonen*, 511 U.S. at 381-82. But the Court's decision was grounded on the absence of a federal statute making jurisdiction over the dispute regarding the

settlement agreement depend on jurisdiction over the dispute that was settled. *See id.* at 381. In contrast to the situation in *Kokkonen*, Section 4 creates a federal remedy that is available as to disputes that would fall within the federal courts' jurisdiction.

An understanding of the derivative nature of federal question jurisdiction over Section 4 petitions also resolves any objection that such jurisdiction contravenes the well-pleaded complaint rule. The federal nature of a dispute to be arbitrated can be pleaded as easily as the citizenship of the parties or the amount in controversy. Where a well-pleaded Section 4 petition seeks to compel arbitration of a dispute involving a federal question, the basis of federal jurisdiction will be apparent from the petition itself.

III. Fidelity to the Plain Meaning of FAA Section 4 Furthers the Important Federal Policy Favoring Arbitration Agreements.

By directing federal courts to enforce arbitration agreements whenever the dispute to be arbitrated falls within the federal courts' jurisdiction, Section 4 gives full effect to the "liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. That policy would be frustrated by an interpretation of Section 4 that often denies federal courts the ability to compel arbitration of federal question claims despite the existence of a valid agreement to arbitrate.

The situation in *Cintas* illustrates the correctness of the rule adopted by the Fourth Circuit in *Vaden*

(and by other courts in the cases in accord with it) and shows how a contrary rule would reward the forum-shopping tactics of parties who wish to avoid arbitration in accordance with a contractual place-of-arbitration term.

Each of the respondents to Cintas' petitions to compel arbitration first sued Cintas on FLSA claims in federal district court, invoking federal question jurisdiction. If they had sued Cintas in the district courts for the counties where they last worked for Cintas, Cintas could have responded by moving to compel arbitration in those cases. There would be no question as to the district courts' jurisdiction to consider Cintas' "embedded" motions. But the respondents chose for tactical reasons to seek a nationwide class proceeding against Cintas in the district court for the Northern District of California. That district court decided that it lacked the power to order arbitration outside the Northern District of California. Cintas was thus forced to file "independent" Section 4 petitions.

Under the Petitioner's view of Section 4, Cintas' petitions could not be adjudicated in the district courts that have the power to enforce the parties' arbitration agreements as written, because the *Cintas* respondents chose to sue in a district court that decided it lacks that power. The *Cintas* respondents would thereby succeed in their effort to avoid federal enforcement of the agreed-upon place-of-arbitration term. The *Vaden* rule avoids this arbitrary and unjust result by recognizing that federal jurisdiction over a Section 4 petition derives from federal jurisdiction over the underlying dispute – and does not depend on another party's choice of

forum, especially a choice acted on in violation of the agreement to arbitrate.

Similarly, the *Vaden* rule preserves federal courts' ability to enforce agreements to arbitrate federal claims when the party resisting arbitration chooses not to file a lawsuit at all. Consider, for example, a situation in which one party to a software license agreement with an arbitration clause believes that the other party is using its copyrighted software in violation of the Copyright Act, 17 U.S.C. §§ 101-1332. Such a situation arose in *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044 (10th Cir. 2006). If the party alleging infringement wanted to avail itself of arbitration, but the other party refused to arbitrate in accordance with the arbitration clause, the Petitioner's interpretation of Section 4 here would place the first party in an untenable position. Although federal question jurisdiction would exist over the underlying controversy, *Image*, 459 F.3d at 1048-51, the aggrieved party would not be able to initiate a federal action to compel arbitration. Nor would the infringer be likely to seek a judicial audience, since it would prefer to continue its infringement with impunity. Thus, notwithstanding the clear intent of Section 4, the party claiming infringement would have no recourse to the federal courts to enforce an agreement to arbitrate federal claims. But if, as in *Image*, the party accused of infringement invoked the arbitration clause, the federal courts could enforce the agreement. *See id.* at 1055-59. There is no rational basis for these differing results.

Cintas' current situation and the *Image* scenario highlight the wisdom of the Fourth Circuit's decision in *Vaden*. Under *Vaden*, the doors of federal courts are not opened or shut depending on whether, or where, the party resisting arbitration chooses to sue the party wishing to arbitrate. Congress surely did not intend for federal jurisdiction over Section 4 petitions to be so manipulated by parties seeking to evade their arbitration agreements. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (considering whether a federal court may resolve a claim of fraud in the inducement of a contract containing an arbitration clause and holding that "it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court").

In short, the *Vaden* rule gives full effect to Congress' intent that the federal courts have authority to order the arbitration to which parties agreed as a means of resolving federal claims. A contrary rule would "mean[] that, for all practical purposes, a federal court could never hear a suit to compel arbitration unless the parties happen to be diverse." *Vaden*, 396 F.3d at 372-73. Moreover, even the competing approach to the issue, that taken in *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2d Cir. 1996), requires courts to make an assessment of the amount in controversy, a necessary element of diversity jurisdiction, thus requiring the court to look through to the parties' underlying dispute.

Section 4 reflects the importance Congress attached to *federal* enforcement of agreements to

arbitrate federal claims. Indeed, state-court enforcement is frequently not a viable alternative. This Court has not expressly held that Section 4 applies in state courts, *see, e.g., Moses H. Cone*, 460 U.S. at 26-27, and taking that as if it were a cue, some state courts have refused to apply Section 4. *See, e.g., St. Fleur v. WPI Cable Sys.*, 879 N.E.2d 27, 32-33 (Mass. 2008); *Cronus Investments, Inc. v. Concierge Servs.*, 107 P.3d 217, 224-26 (Cal. 2005).

Not all states have statutes analogous to Section 4; to the contrary, some have statutes making certain arbitration agreements unenforceable. *See, e.g.*, Ala. Code § 8-1-41 ("The following obligations cannot be specifically enforced: . . . An agreement to submit a controversy to arbitration"); N.Y. Gen. Bus. Law § 399-c ("No written contract for the sale or purchase of consumer goods, . . . to which a consumer is a party, shall contain a mandatory arbitration clause."). These states also have courts that are often reluctant to hold such statutes preempted by the FAA. *See, e.g., Keene v. Hayden*, 964 So. 2d 10, 11 (Ala. 2007) (reversing grant of motion to compel arbitration on grounds that movants offered no evidence that real estate contract involved interstate commerce); *Baronoff v. Kean Dev. Co.*, 818 N.Y.S.2d 421, 424-25 (N.Y. Sup. Ct. 2006) (holding that construction contract did not affect interstate commerce and thus was not subject to the FAA). *See also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (reversing the Montana Supreme Court's decision, on remand from this Court, to persist in applying a Montana statute that disfavored arbitration agreements).

Even if a dispute unquestionably fell within the ambit of the FAA and the parties succeeded in overcoming state law restricting enforcement of arbitration agreements, they might well face a patchwork of differing enforcement mechanisms without the uniformity of Section 4. *See, e.g.*, Ala. Code § 6-6-1, *et seq.* (containing no expedited procedure to compel arbitration); N.H. Rev. Stat. Ann. § 542:1, *et seq.* (same). And even if a state had procedures that might appear to mirror Section 4, other procedures within the state's law may not be as welcoming to arbitration as other federal procedures. *See, e.g.*, Ohio Rev. Code Ann. § 2711.23 (medical claims arbitrations must involve three arbitrators and arbitration expenses must be divided equally between the parties); N.D. Cent. Code, § 32-29.3-04 (creating numerous unwaivable limitations on the conduct of an arbitration).

For reliable and consistent enforcement of arbitration agreements, many parties – especially those doing business nationwide – must turn to the federal courts. Congress did not discriminate, in Section 4's provision for prompt, uniform federal enforcement of arbitration agreements, between some disputes like the FLSA disputes in *Cintas* that meet the requirements of federal question jurisdiction and other disputes that meet the requirements of diversity jurisdiction.

CONCLUSION

For the reasons set forth above, this Court should affirm the Fourth Circuit's holding that a federal court has jurisdiction to hear a Section 4

petition to compel arbitration if it would have jurisdiction over a suit on the underlying dispute.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BETTY E. VADEN,

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v.

DISCOVER BANK, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE FINANCIAL SERVICES ROUNDTABLE, CONSUMER BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AND MARYLAND BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a district court has federal-question jurisdiction over an action to compel arbitration brought pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, when the district court would have jurisdiction under 28 U.S.C. § 1331 over the subject matter of a suit arising out of the parties' underlying controversy if there had not been an arbitration agreement.

2. Whether a controversy between the parties regarding respondents' compliance with state usury laws that is completely preempted by Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, is sufficient to confer federal-question jurisdiction under Section 1331 over an action to compel arbitration pursuant to Section 4 of the Federal Arbitration Act.

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BRIEF OF THE FINANCIAL SERVICES ROUNDTABLE, CONSUMER BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AND MARYLAND BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The Financial Services Roundtable, the Consumer Bankers Association, the American Financial Services Association, the American Bankers Association, and the Maryland Bankers Association respectfully submit this brief as *amici curiae* in support of respondents.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a coalition of prominent national and state financial services organizations whose members include various companies that rely on arbitration to resolve controversies with customers and contractors. Not all financial services institutions rely on arbitration to resolve controversies, but many

---

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

of them have chosen to do so because of the efficiencies of arbitration.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

The Consumer Bankers Association (CBA) is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

Founded in 1916, the American Financial Services Association (AFSA) is the trade association for a wide variety of market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to

the American consumer, providing approximately 20 percent of all consumer credit.

The American Bankers Association (ABA) is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold an overwhelming majority of the domestic assets of the banking industry in the United States.

The Maryland Bankers Association (MBA) was formed in 1896 and is a trade association representing 93 percent of the deposits comprised of nearly all state chartered and national banks with operations in Maryland, as well as most savings and loan associations doing business in Maryland.

SUMMARY OF ARGUMENT

I.

A. Section 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, creates a federal cause of action for a party to compel arbitration under a written arbitration agreement in a civil or admiralty matter. Without additional instruction from Congress, this Section 4 cause of action created by Congress would constitute an action "arising under" federal law and would thus create federal-question jurisdiction in federal court under 28 U.S.C. § 1331, regardless of the nature of the underlying controversy to be arbitrated.

But Congress provided further instruction in Section 4 of the FAA. This Court recognized in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983), that the text of Section 4 of the FAA reflects Congress's intent to limit the otherwise applicable federal-question jurisdiction over a Section 4 cause of action where a federal district court would not have jurisdiction over the subject matter of the underlying controversy, for example a state contract controversy not raising a federal question and not involving diverse parties. Here, however, there is no dispute that the parties' underlying controversy is completely preempted by federal banking law and therefore the district court had jurisdiction to compel the arbitration of that controversy.

B. This Court should be particularly reluctant to read Section 4 of the FAA as petitioner suggests to limit the existing general grant of jurisdiction over this federal cause of action.

First, petitioner's reading of Section 4's limitation on jurisdiction would undermine one of the core purposes of the FAA, which was to provide that arbitration agreements would be enforceable. That is so because petitioner's jurisdictional rule would exclude from federal court enforceability a significant category of actions to compel arbitration pursuant to Section 4 of the FAA and leave those actions to state court where there may be no Section 4 cause of action at all. Indeed, many state courts (including courts in Maryland, where this action arose) have held that the

federal Section 4 cause of action to compel arbitration is not available in state court. Although many States have created their own causes of action to compel arbitration, such statutes have not been adopted in every State. And, even when a State has created a cause of action, it may not be co-extensive with the scope of Section 4 because, for example, it exempts particular subjects such as credit disputes.

Second, petitioner's broad reading of Section 4's limitation on jurisdiction is contrary to another core purpose of the FAA, which is to promote timely resolution of controversies that are subject to arbitration agreements. Relegated to state court, actions to compel arbitration of controversies involving claims arising under federal law may languish and the right to arbitrate may become meaningless because some States, even when they provide a state cause of action to enforce agreements to arbitrate, do not authorize immediate appeal of a court decision refusing to compel arbitration. In those States, parties may be forced to litigate their underlying controversy on the merits *before* the party seeking arbitration is entitled to obtain appellate review of the trial court's refusal to compel arbitration.

Third, petitioner's restrictive view of federal court jurisdiction would undermine the utility of arbitration agreements to industries that operate in multiple States and that have come to rely on uniform agreements for their customers and contractors, and uniform enforcement by the courts.

Unfortunately, there is evidence that, even after enactment of the FAA, state courts overall are less willing to enforce arbitration agreements than federal courts.

C. Petitioner mischaracterizes a piece of the drafting history of Section 4 of the FAA which, when correctly understood, provides further support for respondents' interpretation. Specifically, when Congress provided in Section 4 for federal court jurisdiction over actions to compel arbitration in cases where a federal district court would have jurisdiction "of the subject matter of a suit arising out of the controversy between the parties," Congress fully intended that the federal court examine the subject matter of the parties' underlying controversy to determine whether the controversy would give rise to either federal-question jurisdiction or diversity jurisdiction.

In considering the FAA, the House of Representatives passed a provision, ultimately not adopted by the Senate, that addressed diversity jurisdiction and would have reduced the amount-in-controversy requirement for diversity cases underlying an action to compel arbitration pursuant to Section 4. The House there used the term "controversy" to refer to the underlying controversy and would have required that the federal court rely on the value of that controversy. Such an examination of the underlying controversy is precisely how all courts have determined whether a Section 4 action to compel arbitration in federal court based on diversity

jurisdiction meets the statutory requirement that "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a).

Petitioner offers no other means to measure the amount-in-controversy, and no reason to support the distinction she would create between the method for determining whether federal court jurisdiction exists over a Section 4 action based on federal-question jurisdiction (she would have the court look only to the action to compel arbitration) as opposed to whether it exists based on the diversity of parties (which she apparently acknowledges requires the court to look to the underlying controversy to determine the amount in controversy).

II.

Under the plain language of Section 4, the district court had jurisdiction over respondents' Section 4 cause of action to compel arbitration because a federal court would have jurisdiction over an action between the parties on the subject matter of a suit arising out of the underlying merits controversy regarding whether respondents engaged in unlawful usury.

A. The claim of unlawful usury in the underlying controversy arises under federal law because it is completely preempted by Section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1831d.

Section 27 was modeled on Sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85, 86 "to prevent discrimination against State-chartered insured depository institutions, including insured savings banks." 12 U.S.C. § 1831d(a). In *Beneficial National Bank v. Anderson*, 539 U.S. 1, 8-9, 11 (2003), this Court held that because Sections 85 and 86 of the National Bank Act "provide the exclusive cause of action for [usury] claims" against national banks, those provisions "completely preempt" state law claims, which are therefore treated as federal claims that "arise under" federal law. The same is true for Section 27 of the FDIA, which governs state banks, and thus petitioner's allegations of usury against a state bank likewise arise under federal law.

B. Citing *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002), petitioner contends, nonetheless, that because she raised her Section 27 claim (in the guise of a state claim) only as a counterclaim in a pending state court proceeding, respondents cannot remove the pending state action to federal court and, thus, there is no "arising under" jurisdiction.

But the FAA does not require that a state civil action be removable to federal court in order for the federal court to have jurisdiction over a Section 4 action to compel arbitration. All that Section 4 requires for federal court jurisdiction is that an action to compel arbitration in district court be one where the district court would have jurisdiction over the subject matter of a lawsuit that would arise out of the

underlying controversy that the party seeks to arbitrate (*e.g.*, because the subject matter of the controversy arises under federal law or the underlying controversy meets the requirements for diversity jurisdiction).

The existence of a claim in a pending state court lawsuit is simply evidence of the nature of the underlying controversy between the parties. It cannot control the federal court's jurisdiction to hear a Section 4 cause of action to compel arbitration. Indeed, as respondents note (and petitioner agrees), no litigation need be pending in order for a Section 4 action to be initiated.

ARGUMENT

THE FEDERAL DISTRICT COURT HAD JURISDICTION OVER RESPONDENTS' ACTION TO COMPEL ARBITRATION PURSUANT TO SECTION 4 OF THE FAA BECAUSE THE FEDERAL COURT WOULD HAVE HAD JURISDICTION OVER THE UNDERLYING CONTROVERSY OF WHETHER RESPONDENTS CHARGED USURIOUS RATES OF INTEREST

Petitioner contends that a federal district court has no jurisdiction to determine whether she and respondents must engage in the arbitration to which they previously agreed in their written agreement. Petitioner is wrong because Congress intended federal courts to have jurisdiction over a cause of action to compel arbitration pursuant to Section 4 of

the Federal Arbitration Act (FAA), 9 U.S.C. § 4, whenever the district court would have jurisdiction over suit between the parties on the subject matter of the underlying controversy.

Congress intended that the federal court would determine whether it has jurisdiction over an action to compel arbitration by looking through to the subject matter of the controversy that the action seeks to arbitrate. The federal court must look through to determine whether the federal court would have jurisdiction over that underlying controversy, *e.g.* because the controversy arises under federal law (which would give rise to federal-question jurisdiction) or the controversy involves diverse parties and the statutorily required amount (which would give rise to diversity jurisdiction).

That determination in this case establishes that there is federal court jurisdiction because the controversy that petitioner has refused to arbitrate involves a claim that respondents charged usurious interest on her credit card. That claim arises under federal law, and thus would give rise to federal-question jurisdiction in federal court because the claim is "completely preempted" by Section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1831d.

I. A Federal Court Has Jurisdiction Over An Action Brought To Compel Arbitration Pursuant To Section 4 Of The FAA Whenever It Would Have Jurisdiction Over The Underlying Controversy Which The Party Seeks To Arbitrate

Respondents have shown that Section 4 of the FAA is properly read to establish federal-question jurisdiction over a Section 4 cause of action to compel arbitration whenever the district court would have jurisdiction over the underlying controversy which the party seeks to arbitrate. Resp. Br. 13-39. The only actions to compel arbitration pursuant to Section 4 of the FAA that cannot be heard in federal court are those where the underlying controversy also could not be heard in federal court, *e.g.*, cases where there would be neither diversity jurisdiction nor federal-question jurisdiction over the subject matter of the underlying controversy because it is a dispute of state law between non-diverse parties.

Amici concur with this reading, and contend that, in addition to being compelled by the text, structure and court precedent (as respondents show), this reading is also compelled to achieve the core purpose of the FAA to ensure prompt enforcement of arbitration agreements and the drafting history of the FAA, which petitioner misreads.

A. The Limitation Of Section 4 On Federal Court Jurisdiction Over Certain Actions To Compel Arbitration Should Not Be Expanded Beyond Its Plain Meaning

Parties to a written agreement to arbitrate a controversy arising out of a transaction involving commerce have a substantive federal right under Section 2 of the FAA to their arbitration agreement being "valid, irrevocable, and enforceable" save for defenses applicable to any other contract. 9 U.S.C. § 2. Section 2 of the FAA "creat[es] a substantive rule" of federal law. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

The federal cause of action to compel the arbitration to which a party has a right under Section 2 is set forth in Section 4 of the FAA. Because it is a cause of action created by Congress, federal courts would normally possess federal-question jurisdiction to hear such an action pursuant to 28 U.S.C. § 1331, regardless of the nature of the underlying controversy to be arbitrated. *See American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) (action "arises under" federal law when cause of action is created by federal law).[2]

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[2] Moreover, contrary to petitioner's contention (Pet. Br. 17), the issue resolved in a Section 4 proceeding regarding the validity and scope of the arbitration agreement involves questions of federal law, and is not solely a question of state contract law. Section 2 establishes "as a matter of federal law" that in determining "the construction of the contract language

(Continued on following page)

But Congress provided further instruction in Section 4 of the FAA and created a limitation on that jurisdiction for certain actions to compel arbitration. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). The text of Section 4 of the FAA reflects Congress's intent to limit the otherwise applicable federal-question jurisdiction of 28 U.S.C. § 1331 over a Section 4 cause of action, but only where a federal district court would not have jurisdiction over the subject matter of the underlying controversy sought to be arbitrated. Petitioner's

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itself," "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Thus, this Court has interpreted arbitration agreements subject to Section 2 without any reference to state law. *See Preston v. Ferrer*, 128 S. Ct. 978, 988-989 (2008) ("following the guide that [*Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)] provides" to determine meaning of arbitration agreement without reference to state law); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (interpreting arbitration agreement without reference to state law); *Southland*, 465 U.S. at 15 & n.7 (same); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (same). In addition, state statutes or common law doctrines that are not generally applicable to all contracts are preempted as applied to arbitration agreements. *See Southland*, 465 U.S. at 16. As such, a Section 4 cause of action to compel arbitration of a Section 2 agreement would also normally qualify as an action "arising under" federal law for purposes of 28 U.S.C. § 1331 because the action would involve resolution of a substantial federal question of law. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) (action "arises under" federal law when the "right to relief under state law requires resolution of a substantial question of federal law").

attempt to expand Section 4's limitation on a federal court's Section 1331 jurisdiction should be rejected because the plain language of Section 4 cannot be reconciled with petitioner's reading that jurisdiction be limited to cases where the parties' agreement to arbitrate is created by federal law.

In particular, Section 4 provides that a party may bring an action to enforce an agreement to arbitrate in "any United States district court which, *save for such agreement, would have jurisdiction* under Title 28, in a civil action or in admiralty *of the subject matter of a suit arising out of the controversy between the parties*." 9 U.S.C. § 4 (emphases added). This Court has explained that this language instructed that not every action under Section 4 of the FAA "create[s] any independent federal-question jurisdiction under 28 U.S.C. 1331 or otherwise." *Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 15 n.9. Instead, there must be an "independent basis for federal jurisdiction" apart from the Section 4 cause of action itself. 460 U.S. at 25 n.32; *see also* 465 U.S. at 15 n.9. Federal courts thus have jurisdiction over the Section 4 cause of action "only when the federal district court would have jurisdiction over a suit on the underlying dispute." 460 U.S. at 25 n.32.

Petitioner purports to rely upon the canon that implied repeals should be narrowly construed, Pet. Br. 20, but that argument is exactly backwards. As this Court has explained, the limiting language of Section 4 is the basis for this Court's conclusion that the FAA is "an anomaly in the field of federal-court

jurisdiction" because it creates a federal cause of action that a federal court does not automatically have federal-question jurisdiction to hear. *Moses H. Cone*, 460 U.S. at 25 n.32. Section 1331, tracing its roots back to the Judiciary Act of 1875, presumptively provides a federal forum for any cause of action arising under federal law. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 515 (1969) ("[I]t has generally been recognized that the intent of the drafters [of Section 1331] was to provide a broad jurisdictional grant to the federal courts."). That jurisdictional grant should not be deemed limited absent an express statement or the clearest implication by Congress in the text of the statute. *See, e.g., Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 643-644 (2002); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-494 (1991); *cf. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

As a result, to the extent that the language in Section 4 is read to limit jurisdiction that otherwise would be available under Section 1331, the canon of construction against implied repeals requires that this limitation of jurisdiction be construed narrowly. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary"); *cf. Lane v. Peña*, 518 U.S. 187, 192 (1996)

(even express repeal of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign").

Under this approach, Section 4 cannot be read to deprive federal courts of jurisdiction over actions to compel arbitration in cases such as this where the subject matter of a suit arising out of the underlying controversy would give rise to federal court jurisdiction. To read Section 4 to deny federal courts jurisdiction over a case in which the underlying controversy actually involves a dispute that itself arises under federal law, and which would have been heard by the federal courts in the absence of an arbitration agreement, would be irrational.

B. The Core Purposes Of The FAA Would Be Undermined By Petitioner's Reading Of Section 4 To Eliminate Federal Court Jurisdiction Because State Courts Do Not Always Provide A Remedy

Petitioner's reading of Section 4 of the FAA, if accepted, would undermine the FAA's key purpose of enforcing arbitration agreements. Petitioner claims (Pet. 44) that the same enforcement remedies are available in state courts, but that is not always so. Some States do not recognize a Section 4 cause of action in state court and do not provide an alternative state cause of action to compel arbitration that is commensurate with the Section 4 cause of action. Also, some States render an action to compel

arbitration meaningless because they do not allow immediate appeal but rather force a trial on the merits of the controversy before allowing appellate review of a court's determination that arbitration is not required.

1. Some States do not provide any practical means to compel arbitration in state court

Petitioner's expansive reading of Section 4's limit on a federal court's jurisdiction to compel arbitration would undermine the FAA's core purpose to provide that arbitration agreements are judicially enforceable. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."). Petitioner's reading would exclude from federal court enforceability certain actions to compel arbitration despite the fact that the underlying controversy would give rise to federal court jurisdiction. Those parties would be left to state courts which do not necessarily provide a cause of action commensurate with Section 4 to enforce the arbitration agreement.

Although this Court has not addressed the question directly, many state courts (including courts in Maryland, where this action arose) have held that the federal Section 4 cause of action is not available in state court. *See, e.g., St. Fleur v. WPI Cable Systems/Mutron*, 879 N.E.2d 27, 32 (Mass. 2008);

Nitro Distributing, Inc. v. Dunn, 194 S.W.3d 339, 351 (Mo. 2006), *cert. denied*, 127 S. Ct. 726 (2006); *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620 (Md. 2001), *cert. denied*, 541 U.S. 983 (2004); *United Nuclear Corp. v. General Atomic Co.*, 597 P.2d 290, 308 (N.M. 1979), *cert. denied*, 444 U.S. 911 (1979). Thus, in those States (and possibly others that have yet to address the issue), a party to an arbitration agreement that is deemed by Section 2 of the FAA to be "valid, irrevocable, and enforceable" nonetheless has no means to bring its federal Section 4 cause of action to compel arbitration in state court.

If such a party looks to state law to enforce the arbitration agreement, it will find that not every State has created a state cause of action to compel arbitration. Alabama, for example, does not have any state law providing for the enforcement of an agreement to arbitrate. *See Allied-Bruce Terminix*, 513 U.S. at 295-296 (Thomas, J., dissenting). Moreover, the States that have created such a cause of action have not always created one that is co-extensive with the scope of Section 4. For example, Maryland, from where the instant case arises, appears to have limited the scope of its state arbitration law to those agreements that provide "for arbitration under the law of the State." Md. Cts. & Jud. Proc. Code Ann. § 3-202. Thus, in the absence of federal court jurisdiction over a Section 4 action, this language may draw into question petitioner's assertion (Pet. Br. 44) that respondents would be able to obtain an order compelling arbitration in Maryland

state court under the state arbitration law. *See Regina Constr. Corp. v. Envirmech Contracting Corp.*, 565 A.2d 693, 696 n.1 (Md. Ct. Spec. App. 1989) (statutory language "raises the question of whether, to be enforceable in a Maryland court, the agreement must in some way make reference to Maryland law").

Other States exempt particular subjects from the scope of their state arbitration laws, including credit disputes. For example, Montana's arbitration law expressly excludes from its scope "any contract by an individual for the acquisition of real or personal property, services, or money or credit when the total consideration to be paid or furnished by the individual is $5,000 or less." Mont. Code Ann. § 27-5-114(2)(b). Other common exemptions in state arbitration laws include disputes regarding insurance, *see, e.g.*, Neb. Rev. Stat. § 25-2602.01(f)(4); S.D. Stat. Ann. § 21-25A-3, or employment, *see, e.g.*, Ark. Code Ann. § 16-108-201(b)(2); Iowa Code Ann. § 679A.1(2)(b), or disputes with professionals such as doctors and attorneys, *see, e.g.*, S.C. Code Ann. § 15-48-10(b)(3).

2. Some state courts have no mechanism for appellate review of a court's refusal to compel arbitration prior to a trial on the merits of the controversy which the party seeks to arbitrate

Elimination of federal court jurisdiction over actions to compel arbitration of certain controversies

also is contrary to another core purpose of the FAA, which is to promote timely resolution of controversies that are subject to arbitration agreements. *See Preston v. Ferrer*, 128 S. Ct. 978, 986 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'").

Relegated to state court, actions to compel arbitration may languish and become meaningless because some States that provide a cause of action to enforce agreements to arbitrate do not authorize immediate appeal of a trial court's refusal to compel arbitration. *See, e.g.*, *Muao v. Grosvenor Properties Ltd.*, 122 Cal. Rptr. 2d 131 (Cal. Ct. App. 2002); *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185 (Mass. App. Ct. 1998), *rev. denied*, 710 N.E.2d 604 (Mass. 1999); *Bush v. Paragon Property, Inc.*, 997 P.2d 882 (Or. Ct. App. 2000); *Batton v. Green*, 801 S.W.2d 923 (Tex. App. 1990).

In those States, parties may be forced to litigate their underlying controversy on the merits *before* the party seeking to compel arbitration is entitled to obtain appellate review of the trial court's order denying its motion to compel arbitration, unlike the system authorized in the FAA. *See* 9 U.S.C. § 16 (order refusing to compel arbitration is immediately appealable).

3. State courts have evidenced a hostility to enforcement of arbitration agreements in a manner that burdens interstate industries

Arbitration agreements are of critical importance to interstate industries that rely on uniform agreements for their customers and contractors, and uniform enforcement by the courts. For example, many financial services companies have opted to enter into arbitration agreements and arbitrate controversies because it is an efficient means of resolving controversies.[3] Research has shown that arbitration is beneficial for consumers, particularly consumers with smaller claims. In a study financially supported by *amicus* American Bankers Association, it was determined that in lending-related cases that were initiated by consumers, a majority of the arbitrations were resolved in favor of consumers, and a larger majority of consumers surveyed were satisfied or very satisfied with the arbitration

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[3] Not every financial services institution seeks to enter into arbitration agreements with their customers. *See* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 Law & Contemp. Probs. 55, 64 (2004) (25% of credit card agreements sampled did not contain arbitration clauses). Thus, customers who do not wish to arbitrate disputes have identifiable market options for obtaining financial services without arbitration agreements. *See* Consumer Action News, *2007 Credit Card Survey*, at 5 (Spring 2007), *available at* http://www.consumer-action.org/downloads/english/CA_News_ CC_07.pdf.

process. *See* Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*, at 9-10, 12-13 (2004) *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf.

These benefits of arbitration agreements to companies and consumers alike are, of course, lost completely when the agreements cannot be enforced. And that is more likely when parties are left to state courts rather than federal courts, because there is evidence that state courts are overall less willing to enforce arbitration agreements through actions to compel than are federal courts. One scholar has reported that "it does seem that state courts are more likely to refuse to enforce arbitration agreements than are federal courts" and that "[a]lthough no empirical studies have been done * * * , the decided cases do seem to support such a general differentiation." Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. Pa. L. Rev. 91, 94 (1998).

After a comprehensive survey of decisions by Florida courts, another commentator has concluded that "certain decisions from the Florida Supreme Court do seem to be at odds with their federal counterparts and, thus, at odds with the federal policy of favoring arbitration." Douglas J. Giuliano, *Parochialism in Arbitration?: How Some Arbitration Decisions By Florida Courts Are At Variance With Federal Arbitration Precedent*, 81 Fla. Bar J. 8, 10

(2007). A survey of California courts has reached the same conclusion. *See* Stephen A. Broome, *An Unconscionable Application Of The Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 Hastings Bus. L.J. 39 (2006).

A recent empirical study about confirmation of arbitration awards (as opposed to enforcement of arbitration agreements through motions to compel arbitration) likewise found that state courts were more likely to overturn such awards than federal courts. *See* Michael H. LeRoy, *Do Courts Create Moral Hazard? When Judges Nullify Employer Liability in Arbitrations: An Empirical Analysis*, at 49 (Spring 2008), *available at* http://ssrn.com/abstract=1116305. These findings indicate that state courts, more than federal courts, are unwilling to respect the decisions of arbitrators, which may also be one of the reasons such courts refuse to compel arbitration in the first instance.

C. The Drafting History Of The FAA Confirms That Congress Intended Federal Courts To Look Through To The Underlying Controversy To Determine Jurisdiction

Respondents show (Resp. Br. 16) that the text of the FAA reflects that, when Congress used the term "controversy" in Section 4, it intended the federal court to look to the substantive controversy that the party seeks to arbitrate to determine jurisdiction over

an action to compel arbitration based on whether that controversy would give rise to federal court jurisdiction if there were no arbitration agreement.

Petitioner's contrary assessment (Pet. Br. 37) is based on a misreading of the drafting history. In 1924, the version of the bill passed by the House of Representatives that ultimately became the FAA contained an additional provision that would have specifically addressed diversity jurisdiction over Section 4 actions. The provision would have reduced the amount-in-controversy requirement for establishing diversity jurisdiction for the Section 4 cause of action. That provision used the term "controversy" for purposes of measuring the value of the action, and in doing so referred back to the underlying merits controversy that "is to be determined by arbitration." 65 Cong. Rec. 11,081 (1924).[4] The Senate, without explanation, adopted a version of the bill without this provision, 66 Cong. Rec. 2759-2760 (1925), and the House accepted the Senate version.

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[4] The provision stated that "if the basis of jurisdiction be diversity of citizenship," which at that time required the showing an amount in controversy in excess of $3,000, "the district court or courts which would have jurisdiction if the matter in controversy exceeded, exclusive of interest and costs, the sum or value of $3,000, shall have jurisdiction to proceed hereunder notwithstanding the amount in controversy is unascertained or is to be determined by arbitration." 65 Cong. Rec. at 11,081.

The House provision, although ultimately not contained in the final law enacted, confirms that Congress intended that the term "controversy" when used in the FAA is meant to refer back to the underlying controversy on the merits that "is to be determined by arbitration." The proposal would have made no sense if it were supposed to refer to the parties' extant dispute whether to arbitrate.

Indeed, as respondents show (Resp. Br. 24-26), examination of the underlying controversy is precisely how courts determine whether a Section 4 action in federal court based on diversity jurisdiction meets the statutory requirement that "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). Petitioner offers no other means to measure the amount-in-controversy and there is none, particularly because Congress instructed that the costs of litigating the action cannot be considered in determining the amount-in-controversy.

There is no reason to distinguish between federal question and diversity cases in terms of looking at the underlying controversy to determine whether a federal court has jurisdiction over a Section 4 action.

II. PETITIONER'S CLAIM AGAINST RESPONDENTS IS COMPLETELY PREEMPTED BY SECTION 27 OF THE FDIA WHICH PRESENTS A CONTROVERSY ARISING UNDER FEDERAL LAW OVER WHICH FEDERAL COURTS WOULD HAVE FEDERAL-QUESTION JURISDICTION

The district court had jurisdiction over respondents' Section 4 cause of action to compel arbitration because a federal court would have jurisdiction over the subject matter of a suit arising under the underlying controversy regarding whether respondents charged petitioner unlawful charges, fees, and rates of interest on her credit card account in violation of state usury laws. Petitioner does not dispute in her opening brief in this Court that the Fourth Circuit was correct that petitioner's usury claim, although framed by petitioner in terms of state law, actually arises under federal law because it is "completely preempted" by Section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1831d. The fact that petitioner raised this federal claim in state court as a counterclaim does not alter the analysis of federal court jurisdiction under Section 4 of the FAA.

A. Section 27 Of The FDIA Completely Preempts Usury Claims Against State Banks

Section 27 of the FDIA was deliberately modeled on Sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85, 86. Sections 85 and 86 of the National Bank Act "provide the exclusive cause of action for

[usury] claims" against national banks." *Beneficial National Bank*, 539 U.S. at 11. "[T]here is, in short, no such thing as a state-law claim of usury against a national bank" because it is preempted by Section 85 and 86. *Ibid.* This Court emphasized that even where a complaint makes no mention of federal law, if the complaint "unquestionably and unambiguously claims that petitioners violated usury laws," that "cause of action against national banks only arises under federal law." *Ibid.*

Whereas Sections 85 and 86 apply to national banks, Section 27 of the FDIA applies to state banks. Section 27 begins by stating Congress's express purpose "to prevent discrimination against State-chartered insured depository institutions, including insured savings banks." 12 U.S.C. § 1831d(a). The discrimination against state banks referenced by Congress was due to this Court's interpretation of Section 85 in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), which placed national banks at a competitive advantage over state banks regarding interstate lending because state banks were still governed by the varying restrictive usury laws of each of the 50 States, whereas interest imposed by national banks was governed only by the State in which they were located. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993).

Congress enacted Section 27(a) two years later, in 1980, and modeled it on Section 85 in order to restore parity between national banks (chartered

by the federal government) and state banks with regard to the interest rates they could charge.[5] At the same time, Congress enacted Section 27(b), which is modeled on and tracks Section 86 of the National Bank Act, 12 U.S.C. § 86. Section 86 provides a federal cause of action for violations of Section 85 of the National Bank Act. As explained in *Beneficial National Bank*, starting in the Nineteenth Century, this Court has adopted a "consistent construction of [Section 86 of] the National Bank Act as providing an *exclusive* federal cause of action for usury against national banks." 539 U.S. at 10 (emphasis added). Thus, state law causes of action were preempted and the state law "cause of action [alleged in a complaint] necessarily arises under federal law." *Id.* at 9. Similarly, Congress provided borrowers a federal cause of action against state banks in Section 27(b) if they are charged interest in excess of that authorized by Section 27(a).

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[5] Section 27(a) provides that a "State-chartered insured depository institution[ ]" (which the provision also describes as a "state bank") may "take, receive, reserve, and charge on any loan or discount made, or upon any note, . . . interest . . . at the rate allowed by the laws of the State, territory, or district where the bank is located." 12 U.S.C. § 1831d(a). State banks alternatively are authorized to choose to charge "a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank" in the district where the state bank is located, if that rate is greater. *Ibid.* The statute further provides that state banks have the right to charge such interest on any loan "notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section." *Ibid.*

Because Congress used Section 86 as a model for Section 27(b), it follows that Congress intended that the same complete preemption to apply for claims, such as petitioner's, that fall within the scope of Section 27. *See Beneficial National Bank*, 539 U.S. at 7-8 (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987)); *see also Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). That likewise is the position taken by the Federal Deposit Insurance Corporation, which submitted an *amicus* brief in the Fourth Circuit explaining that petitioner's state law claims were completely preempted and thus arose solely under federal law. Pet. App. 23a-24a (describing brief).

The legislative history of Section 27 confirms that Congress made a conscious choice to incorporate the National Bank Act language into Section 27. *See, e.g.*, 126 Cong. Rec. 6,907 (1980) (statement of Sen. Bumpers); 125 Cong. Rec. 30,655 (1979) (statement of Sen. Pryor). It provides no basis for concluding that Congress intended state banks to have less access to federal courts than national banks. To the contrary, as noted above, the entire thrust of Section 27 was to create parity between the two categories of banks.

B. The Procedural Posture Of The Claim In State Court Is Irrelevant To Whether A District Court Would Have Jurisdiction Over The Subject Matter Of A Suit Arising Out Of The Underlying Controversy If There Were No Arbitration Agreement

Petitioner does not dispute that if she initiated a civil action that included her usury claim against respondents (whether denominated a Section 27 claim or a state law cause of action for usury), a federal district court would have jurisdiction over the action because one of her claims would "arise under" federal law. *Cf. Beneficial National Bank*, 539 U.S. at 10. Moreover, she does not appear to dispute that if she initially had filed such an action in state court, respondents could have removed the action to federal court under 28 U.S.C. § 1441, again because one of her claims would be "arising under" federal law. *See Beneficial National Bank*, 539 U.S. at 9 & n.5. Indeed, if petitioner had threatened to bring such an action, respondents could have brought a declaratory judgment action in federal court against petitioner seeking a declaration that petitioner's potential usury cause of action was meritless because they were in compliance with Section 27. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 n.19 (1983); Resp. Br. 20 n.10.

Petitioner nonetheless contends (Pet. Br. 46-52) that the fact that she raised her Section 27 claim (in the guise of a state claim) only as a counterclaim in a

pending state court proceeding means that there is no federal court jurisdiction over the Section 4 action to compel arbitration because, she claims, respondents cannot remove the pending state action to federal court pursuant to *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002).

But the FAA does not require that a state court action be *removable* to federal court in order for the federal court to have jurisdiction over a Section 4 action to compel arbitration. As noted above, Section 4 requires only that the district court would have jurisdiction over the subject matter of a suit brought by one of the parties on their underlying controversy on which the party wants the court to compel arbitration.[6]

The existence of a claim in pending state court litigation is nothing more than evidence of the underlying controversy. The fact that the underlying controversy manifests itself as a state court counterclaim does not control the federal court's jurisdiction to hear a Section 4 cause of action to compel arbitration. As respondents show (Resp. Br. 6, 42-43), and petitioner agrees (Pet. Br. 4), no litigation

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[6] Indeed, to the extent that the posture of potential litigation could be relevant to federal court jurisdiction to hear a Section 4 action to compel arbitration, petitioner ignores that the district court would possess jurisdiction over a declaratory judgment that respondents can still file against her. *See Franchise Tax Bd.*, 463 U.S. at 19 n.19.

need be pending or anticipated in order for a Section 4 action to be initiated.

CONCLUSION

For the reasons set forth above, and in respondents' brief on the merits, the Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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INTEREST OF *AMICI CURIAE*

Imre S. Szalai is an Associate Professor of Law at California Western School of Law.[1] He focuses his scholarship on the Federal Arbitration Act ("FAA") and its legal framework supporting arbitration. His article, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319 (2007), focuses on the FAA jurisdictional issue raised in this case.

Richard A. Bales serves as Associate Dean of Faculty Development and Professor of Law at Salmon P. Chase College of Law, Northern Kentucky University. He has published extensively in the field of alternative dispute resolution. His article, *Federal Question Jurisdiction and the Federal Arbitration Act*, COLO. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1112304, examines the FAA jurisdictional issue raised in this case.

Amici believe Petitioner's arguments conflict with the text of the FAA and with the historical record regarding the enactment of the FAA and state

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[1] *Amici* file this brief in their individual capacities, and not as representatives of the institutions with which they are affiliated. No counsel for either party authored the brief in whole or in part. No person or entity, other than California Western School of Law, which paid for the printing of this brief through Professor Szalai's research funds, made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief, and their consents have been filed with the Court.

arbitration statutes during the 1920s. Additionally, *amici* are concerned that the constricted view of the FAA urged by Petitioner threatens to dismantle the entire legal framework of the FAA, not just the important enforcement provision set forth in 9 U.S.C. § 4. This brief examines the historical background regarding the FAA and demonstrates why *amici*, as well as other FAA scholars, have found Petitioner's construction of the FAA to be seriously flawed.

SUMMARY OF ARGUMENT

When Congress enacted the FAA, Congress forcefully declared that arbitration agreements are "valid, irrevocable, and enforceable," 9 U.S.C. § 2, and Congress erected a legal framework to support arbitration. This legal framework provides that a federal court has jurisdiction to enforce an arbitration agreement if the court, "save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4 [hereinafter "save for" clause].

Two conflicting jurisdictional views of § 4 have emerged. The view urged by Petitioner threatens to dismantle the FAA's legal framework, which was intended to facilitate, not impede, arbitration. Under this constricted view, articulated by the Southern District of New York in *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957 (S.D.N.Y. 1988),

and then by the Second Circuit in *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2d Cir. 1996), the term "controversy" in § 4 refers to the dispute regarding the breach of the arbitration agreement. *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005) ("Those urging adoption of the [flawed] *Westmoreland* doctrine would interpret the phrase 'controversy between the parties' to encompass only the discrete dispute about whether there is a valid arbitration agreement."). Under this constricted approach, a federal court does not have subject matter jurisdiction over a § 4 petition to compel arbitration merely because the underlying claim to be arbitrated is subject to federal question jurisdiction. *Westmoreland*, 100 F.3d at 268.[2]

Under the broader interpretation, followed by the Fourth Circuit in this case, the term "controversy," as used not only in § 4 but also in other provisions of the FAA, refers to the underlying dispute to be arbitrated. *Discover Bank*, 396 F.3d at 370. Accordingly, a federal court has jurisdiction to enforce an arbitration agreement if the court has jurisdiction pursuant to Title 28 of the subject matter of a suit arising out of the underlying dispute to be arbitrated.[3]

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[2] This Brief refers to the constricted jurisdictional view as the "*Westmoreland* approach."

[3] This Brief refers to the broader jurisdictional view as the "*Discover Bank* approach."

The historical context of the enactment of the FAA and the plain language of the FAA both demonstrate that the *Discover Bank* approach is correct, and the *Westmoreland* approach is seriously flawed.

First, the *Westmoreland* approach treats the "save for" clause in the FAA as responding to the ouster problem, but the historical background regarding the FAA's enactment demonstrates this construction is incorrect. The FAA was patterned after state arbitration statutes that had been recently enacted in New York in 1920 and New Jersey in 1923, and all three statutes were drafted by the same reformers. The ouster problem existed in both federal courts and state courts prior to the enactment of the New York and New Jersey statutes. If the "save for" clause were a response to the ouster problem, as the *Westmoreland* approach suggests, these state arbitration statutes would contain a similar "save for" clause because the ouster problem existed in both state and federal courts. However, a similar "save for" clause does not exist in the state arbitration statutes drafted by the same reformers who drafted the FAA. Furthermore, there is evidence that the "save for" clause was purposefully included in § 4 to deal with a federal jurisdiction issue, not the ouster problem existing in both state and federal courts.

Second, Congress amended § 4 of the FAA in 1954 to include a broad reference to Title 28. The legislative history regarding the 1954 amendments explicitly cites the federal question jurisdiction statute, 28 U.S.C. § 1331, to illustrate a jurisdictional

basis for a petition to compel arbitration pursuant to § 4 of the FAA. Reading this legislative history together with the plain text of § 4, the FAA simply instructs federal courts to set aside the arbitration agreement and consider whether the court would have subject matter jurisdiction pursuant to Title 28, including both federal question and diversity jurisdiction, over the dispute to be arbitrated.

Third, Petitioner's overly restrictive view threatens to undermine the FAA by curtailing the opportunities for federal court enforcement of arbitration agreements. A federal forum for enforcing arbitration agreements is significant because of concerns regarding the enforcement of arbitration agreements in state courts.

Fourth, the jurisdictional issue presented in this case, although involving § 4, impacts the other provisions of the FAA, and the flawed *Westmoreland* approach urged by Petitioner threatens to undermine the entire legal framework of the FAA.

ARGUMENT

I. The Historical Background Of The Enactment Of The FAA And Other Arbitration Statutes Thoroughly Discredits *Westmoreland*'s Interpretation Of § 4 As A Response To The Ouster Problem

Section 4 provides that a federal court has jurisdiction to enforce an arbitration agreement if the

court, "save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4.[4] According to the *Westmoreland* approach advocated by Petitioner, the phrase "save for such agreement" was included to respond to the ouster problem. Brief of Petitioner at 26. However, as explained in more detail below, the historical background surrounding the enactment of the FAA and other arbitration statutes during the 1920s refutes the constricted *Westmoreland* view of § 4.

Immediately following the enactment of the FAA in 1925, one of the earliest commentaries regarding the FAA used the *Discover Bank* approach when discussing the jurisdiction of federal courts to compel arbitration. In January 1926, the editorial board of the Harvard Business Review, with assistance from a business law scholar, published an article examining the recently enacted FAA. *Legal Developments Significant in Business – The United States Arbitration Law*, 4 HARV. BUS. REV. 236 (1926). The article explained that the FAA "does not extend in any way the jurisdiction of the Federal Courts," and the article then summarized when a federal court has jurisdiction to

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[4] Section 4, as originally enacted, referenced the judicial code instead of Title 28 and provided that an aggrieved party may petition "any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883.

enforce an arbitration agreement: (1) "The agreement to arbitrate must be made in writing prior to the ***dispute***, unless both parties agree to arbitration subsequent to the ***dispute***," and (2) "The ***dispute*** must be one that comes under the jurisdiction of the Federal Courts." *Id.* at 237 (emphases added). This early, firsthand commentary treated the underlying dispute to be arbitrated as the appropriate basis for jurisdiction to compel arbitration under the FAA.

This early commentary regarding the FAA is consistent with the plain meaning of § 4. The plain meaning of the phrase "save for" is "but for." 14 OXFORD ENGLISH DICTIONARY 528 (2d ed. 1989) (defining "save for" as "exception being made for, but for"). As used in the context of the FAA, the language "save for such agreement" in § 4 simply directs the court to set aside the arbitration agreement and examine whether it has subject matter jurisdiction of the underlying dispute to be arbitrated as if the agreement had never existed. *Discover Bank*, 396 F.3d at 370.

Over sixty years after the enactment of the FAA, the district court in the *Valenzuela Bock* case, and then the Second Circuit in *Westmoreland*, grossly misinterpreted the language "save for such agreement" in § 4. According to the *Westmoreland* approach advocated by Petitioner, § 4's "save for" language is a "response to the antiquated common law principle that an agreement to arbitrate would oust the federal courts of jurisdiction," *Westmoreland*, 100 F.3d at 268; Brief of Petitioner at 26; *see also Valenzuela Bock*, 696

F. Supp. at 962-63. Prior to the enactment of modern arbitration statutes like the FAA during the 1920s, courts generally refused to enforce arbitration agreements because such agreements "ousted" courts of jurisdiction. *Valenzuela Bock*, 696 F. Supp. at 962 (citations omitted) (the "ouster problem"). Under the *Westmoreland* approach advocated by Petitioner, the "save for such agreement" language "instruct[s] the court to 'set aside' not the arbitration agreement itself or the suit before it to specifically enforce that agreement, but merely the previous judicial hostility to arbitration agreements." *Community State Bank v. Strong*, 485 F.3d 597, 631 (11th Cir. 2007) (Marcus, J., specially concurring, joined by Jordan, J.).[5] According to Petitioner, the simple word "agreement" in § 4's phrase "save for such agreement" is somehow code language for the ancient ouster doctrine adopted from the English courts. Brief of Petitioner at 26.[6]

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[5] The Eleventh Circuit in *Community State Bank* subsequently granted a rehearing en banc, 508 F.3d 576 (11th Cir. 2007), and is now holding the case in abeyance pending a decision of the Court in this case.

[6] An earlier draft of the FAA from 1921 helps demonstrate that the term "agreement" was not intended to mean "the ancient ouster doctrine." The enforcement provision contained in this earlier draft stated that "a party aggrieved by the failure, neglect or refusal of another to perform under a contract providing for arbitration or a submission to arbitration may petition the District Court of the United States which, save for such contract or submission, would have jurisdiction . . . of the controversy between the parties. . . ." *Report of the Committee on Commerce, Trade and Commercial Law*, 46 A.B.A. REP. 309, 360

(Continued on following page)

Several FAA scholars have condemned *Westmoreland*'s textual and historical interpretation of § 4 as "utterly unfounded," "tortured," "historically inaccurate," "bizarre," and as creating significant "adverse effects" that would undermine the entire FAA.[7] The historical background of the enactment of the FAA and other contemporaneously enacted state arbitration statutes confirms that the "save for" language does not respond to the ouster problem, as the *Westmoreland* approach contends, and instead deals with an issue of federal jurisdiction. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999). The "save for" clause is found only in the FAA and not in the New York or New Jersey state arbitration statutes upon which the FAA was based. However, the ouster problem existed in both federal and state courts. If the *Westmoreland* approach were correct in interpreting the "save for" clause as a response to the ouster problem, a similar "save for" clause would have existed in the contemporaneously enacted state

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(1921). The phrase "save for such contract or submission" in this earlier draft suggests that the term "agreement" in the FAA has a plain meaning referring to the agreement to arbitrate, not the ancient ouster doctrine adopted from the English courts as suggested by Petitioner.

[7] *See* 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999); Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319 (2007); Richard A. Bales & Jamie Ireland, *Federal Question Jurisdiction and the Federal Arbitration Act*, COLO. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1112304.

arbitration statutes drafted by the same reformers who drafted the FAA. Finally, Congressional testimony confirms this historical analysis and demonstrates that the "save for" clause was purposefully added to the FAA to deal with an issue of federal jurisdiction, not the ouster problem that existed in both state and federal courts.

A. The FAA Contains A "Save For" Clause Not Included In The New York And New Jersey Arbitration Statutes, Despite All Three Statutes Being Drafted By The Same Reformers

An arbitration reform movement led by members of the New York Chamber of Commerce, the American Bar Association, the New York Bar Association, and others helped reverse the long-standing judicial reluctance to enforce arbitration agreements by proposing legislation in the 1920s before state legislatures and Congress to provide for the enforcement of such agreements. *See generally* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 25-47 (1992). The first modern arbitration statute providing for the enforcement of arbitration agreements was enacted in New York in 1920, and New Jersey enacted a similar statute in 1923. *Id.* at 34-35, 42. In 1925, Congress enacted the FAA, which was patterned after these two state statutes. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL

ARBITRATION LAW § 9.2.3.3 (1999).[8] All three of these modern arbitration statutes were drafted by the same reformers.[9]

The only significant difference between the enforcement provision of § 4 of the FAA and its counterpart in the New York and New Jersey statutes is

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[8] *See also Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong. 40 (1924) [hereinafter 1924 Hearings] (FAA patterned after the "successful New York and New Jersey statutes").

[9] 1924 Hearings at 10 (New York attorney Julius Henry Cohen "has had charge of the actual drafting of the [FAA]"); *id.* at 19 (describing Cohen as the person upon whom the "burden fell of drafting the [FAA]"). Cohen helped draft the New York, New Jersey, and federal arbitration statutes. *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 8 (1923) ("Mr. Cohen . . . prepared and submitted to the New York Legislature a draft of the act which is now the New York law."); Gilbert H. Montague, *They Builded Better Than They Knew*, 46 MICH. L. REV. 1140, 1140-41 (1948) ("Mr. Cohen was one of the original group that drafted and procured the adoption of legislation for commercial arbitration by the Legislatures of New York and New Jersey and by Congress."); *see also* 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999) (recognizing that the same reformers drafted the FAA and the New York and New Jersey arbitration statutes).

the "save for" clause that exists in the federal statute, but not the state statutes. The New York arbitration statute originally stated in relevant part:

> Remedy in case of default.
>
> A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in section two hereof, may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission.

Act of Apr. 19, 1920, ch. 275, § 3, 1920 N.Y. Laws 803, 804.[10] Under the New York statute, an aggrieved party may petition the "supreme court, or a judge thereof," whereas the FAA, as originally enacted, provided that the aggrieved party may petition "any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883. The "save for" clause appearing in the

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[10] Similarly, the New Jersey arbitration statute originally stated that a "party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing for arbitration may petition any justice of the Supreme Court or judge of a Circuit Court, holding court for the county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement." Act of Mar. 21, 1923, ch. 134, § 3, 1923 N.J. Laws 291.

FAA is noticeably absent from the New York and New Jersey arbitration statutes drafted by the same reformers.

B. The Ouster Problem Existed In Both Federal And State Courts

Prior to the enactment of the FAA and similar state arbitration statutes during the 1920s, both federal courts and state courts generally refused to enforce arbitration agreements because of the ouster problem. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999) ("[T]he ouster problem was just as great under state law as it was under federal."); 1924 Hearings at 35 (describing the legal landscape prior to the enactment of the FAA in 1925 and explaining that "[t]his liberty [to disregard an arbitration agreement because courts refused to enforce them] still exists throughout the United States, except within the States of New York and New Jersey, which have laws making such agreements valid and enforceable [as of 1920 and 1923, respectively.]").

A Senate Report regarding the proposed bill that would become the FAA confirms that the ouster problem existed in both state and federal courts. The report explains:

> [I]t is very old law that the performance of a written agreement to arbitrate would not be enforced in equity. . . . Until recently in England, and up to the present time in nearly, if

> not quite all, the States of the Union, such has been the law in regard to arbitration agreements. . . .

S. REP. NO. 68-536 (1924). The Senate Report further explains that these "ancient rules of English law," which treated arbitration agreements as unenforceable because they ousted courts of jurisdiction, have been followed both "by our State ***and*** Federal Courts." *Id.* (emphasis added).

C. The "Save For" Clause In The FAA Cannot Be Explained By The Ouster Problem, Which Existed In Both Federal And State Courts

The *Westmoreland* approach advocated by Petitioner claims that § 4's "save for" clause responds to the ouster problem, and it is undeniable that the ouster problem existed in both federal and state courts, as discussed above.[11] However, the "save for" clause is found only in the FAA and not in the New York or New Jersey state arbitration statutes upon which the FAA was based.[12] If the *Westmoreland* approach were correct in its interpretation of the "save for" clause as responding to the ouster problem, a similar "save for" clause would have been included in the contemporaneously enacted state arbitration statutes drafted by the same reformers who drafted

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[11] *See supra* Section I.B.

[12] *See supra* Section I.A.

the FAA. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999). The "save for" clause in the FAA is not an arbitration-related provision dealing with the ouster doctrine. Instead, the "save for" clause is one of the FAA's federal provisions dealing with jurisdiction. *Id.*[13]

The need for the more descriptive "save for" clause in the FAA likely arises from the difference between the general jurisdiction of state courts and the limited jurisdiction of federal courts. Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 338-39 (2007). If the "save for" clause had been deleted from § 4 of the FAA, § 4 would have been just like its counterparts in the New York and New Jersey statutes and would have provided that any party aggrieved by the failure of another to arbitrate pursuant to an arbitration agreement may petition any United States district court for an order directing the parties to arbitrate. *Id.* Without the "save for" clause, § 4 of the FAA would have dramatically expanded a federal court's jurisdiction to entertain any petition to enforce an arbitration agreement covered by the FAA. *Id.* Instead, § 4 was carefully drafted to ensure that jurisdiction over a petition to compel arbitration was

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[13] *See also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 86 (1992) (explaining that the FAA must be understood both "as a modern arbitration statute" and "as a peculiarly federal act," and the "save for" clause is one of the FAA's federal provisions).

coextensive with federal court jurisdiction over the underlying dispute to be arbitrated. *Id.*

The American Bar Association was involved in drafting the FAA, and at the same time, the American Bar Association was also involved in drafting a Uniform State Act on Arbitration. *See Report of the Committee on Commerce, Trade and Commercial Law*, 47 A.B.A. REP. 288, 289 (1922). The enforcement provisions of both the draft of the FAA and the draft of the Uniform State Act on Arbitration are essentially the same, except the draft of the FAA contains the "save for" clause while the draft of the Uniform State Act does not. *Id.* at 315, 319. Both of these drafts were created at roughly the same time by the same committee of the American Bar Association. *Id.* at 289. The inclusion of the "save for" clause in the draft of the FAA, but not in the contemporaneous draft of the Uniform State Act, helps confirm that the "save for" clause deals with a federal issue, not the ouster problem faced by both state and federal courts.

Properly construed within its historical context, § 4 of the FAA provides that a federal court has jurisdiction to enforce an arbitration agreement whenever the court, putting aside the arbitration agreement, would have jurisdiction over the underlying controversy between the parties, to the fullest extent permitted by Title 28. *Cf.* 1924 Hearings at 34 ("The Federal Courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would normally have jurisdiction of a controversy between the parties.").

D. Congressional Testimony Demonstrates The "Save For" Clause In The FAA Is A Federal Provision, Not A Response To The Ouster Problem

The FAA's legislative history contains testimony from Julius Henry Cohen, a prominent New York City attorney who helped draft the FAA and the New York and New Jersey arbitration statutes.[14] His testimony confirms the historical analysis of the "save for" clause as a federal provision instead of a response to the ouster problem.

Cohen explained to Congress that he patterned the FAA on "the successful New York and New Jersey statutes with ***only*** such changes as seem necessary for the Federal statute." 1924 Hearings at 40 (emphasis added). This testimony confirms that the "save for" clause, which is the only significant difference between the enforcement provision of the federal statute and the New York and New Jersey counterparts, deals with an issue of federal jurisdiction, not the ouster problem faced by both state and federal courts. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999) ("The 'save for' clause was not one of the FAA's arbitration provisions, . . . but one of its federal provisions, dealing with a problem of federal jurisdiction."); Richard A. Bales & Jamie Ireland, *Federal Question Jurisdiction and the Federal Arbitration Act*, COLO. L. REV.

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[14] *See supra* note 9.

(forthcoming 2008) ("if the 'save for' clause were intended to solve the ouster problem, the clause would have been included in other statutes enacted around the same time as the FAA"), *available at* http://ssrn.com/abstract=1112304. As explained above, the inclusion of the more descriptive "save for" clause in the FAA arises from the difference between the general jurisdiction of state courts, like New York and New Jersey courts, and the limited jurisdiction of federal courts.

E. The "Save For" Clause In The FAA Cannot Be Explained By The Division Between Law And Equity

Petitioner claims the simple phrase "save for such agreement" is an instruction for federal courts to set aside the ancient ouster doctrine adopted from England. Brief of Petitioner at 26. In an attempt to bolster this historically and textually flawed argument, Petitioner now claims that the "save for" clause in the FAA represented a Congressional attempt to eliminate confusion in federal courts arising from the division between law and equity. *Id.* at 24. Petitioner, focusing solely on New York, explains that "[u]nlike New York state courts, federal courts remained divided between law and equity" at the time of the FAA's enactment. *Id.* Petitioner then speculates that as a direct result of this division between law and equity in the federal system, federal courts facing a petition to compel arbitration following the enactment of the FAA somehow may become confused and

"might still perceive themselves as ousted of equitable jurisdiction." *Id.* According to Petitioner's strained argument, the "save for" clause therefore had to be added to the federal statute, but not the New York statute, to serve as an extra reminder to federal courts that they had to set aside the ancient ouster doctrine, and this aide memoire would somehow erase confusion arising from the division between law and equity in federal courts. *Id.* at 24-26.

Petitioner's argument that the "save for" clause was included in the FAA to deal with the old division between law and equity is unfounded for several reasons. *First*, Petitioner's argument focuses exclusively on New York and ignores the fact that the FAA was patterned after both "the New York ***and*** New Jersey statutes." 1924 Hearings at 40 (emphasis added). Petitioner claims that "[u]nlike New York state courts, federal courts remained divided between law and equity" at the time of the FAA's enactment, and because the merger of law and equity did not occur in the federal system until 1938, the "save for" clause therefore had to be added to the federal statute, but not the New York statute. Brief of Petitioner at 24-26. However, Petitioner's argument ignores the 1923 New Jersey arbitration statute and the important fact that the merger between law and equity did not occur in New Jersey until 1947, more than twenty years after the adoption of the New Jersey arbitration

statute.[15] Under Petitioner's strained theory that the "save for" clause was necessary to eliminate confusion arising from the division between law and equity, the New Jersey courts would have been confused for more than two decades regarding whether they could enforce arbitration agreements, and like the federal courts, New Jersey courts would have needed an extra instruction to set aside the ouster doctrine. If the "save for" clause were truly meant to deal with the division between law and equity, as Petitioner now claims, New Jersey's contemporaneous arbitration statute, which was drafted by the same reformers as the federal statute,[16] would have contained the same "save for" clause as the federal statute. However, a "save for" clause exists only in the federal statute, and not in the 1923 New Jersey statute.[17] Therefore, the "save for" clause in the FAA was not intended to deal with the division between law and equity as Petitioner now claims.

Second, Petitioner's argument attributing the "save for" clause to the division between law and equity ignores the FAA's legislative history and the express testimony of Julius Henry Cohen. As already

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[15] *See* Alan V. Lowenstein, *The Legacy of Arthur T. Vanderbilt to the New Jersey Bar*, 51 RUTGERS L. REV. 1319, 1331-32 (1999) (explaining that the merger of law and equity did not occur in New Jersey until the adoption of the New Jersey Constitution of 1947).

[16] *See supra* note 9.

[17] *See supra* note 10.

explained above, Cohen testified that he directly patterned the FAA after "the successful New York and New Jersey statutes with ***only*** such changes as seem necessary for the Federal statute." 1924 Hearings at 40 (emphasis added). Therefore, the "save for" clause was intentionally included in § 4 to deal with an issue that existed in federal courts, but not in New York or New Jersey. *See also* 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999) ("The 'save for' clause was not one of the FAA's arbitration provisions, . . . but one of its federal provisions, dealing with a problem of federal jurisdiction."). This Congressional testimony refutes Petitioner's explanation of the "save for" clause and confirms that the "save for" clause did not deal with the division between law and equity, which also existed in New Jersey at the time these modern arbitration statutes were adopted.

Third, Petitioner's argument attributing the "save for" clause to the division between law and equity ignores that in 1954, Congress actually deleted obsolete phrases in the FAA dealing with the old division between law and equity. S. REP. NO. 83-2498, at 8-9 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 3991, 3998-99. If the "save for" clause were designed to deal with the division between law and equity, as Petitioner claims, Congress would have deleted the language "save for such agreement" as surplus when it amended the FAA in 1954.

In sum, the historical background regarding the FAA's enactment discredits as "utterly unfounded," "tortured," and "bizarre" the *Westmoreland*

interpretation of § 4 as a response to the ouster problem. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999). Properly considered within its historical context, § 4's "save for" clause is not a response to the ouster problem or the division between law and equity, as Petitioner claims. Instead, the "save for" clause is one of the FAA's federal provisions. The plain language of § 4 simply instructs federal courts to set aside the arbitration agreement and consider whether the court would have subject matter jurisdiction pursuant to Title 28 over the dispute to be arbitrated.

II. The Legislative History Of Amendments To The FAA Demonstrates The *Discover Bank* Approach Is Correct

The current version of § 4 of the FAA contains a sweeping reference to Title 28 as a basis for jurisdiction to enforce an arbitration agreement. Section 4 provides that a federal court has jurisdiction to enforce an arbitration agreement if the court, "save for such agreement, would have [subject matter] jurisdiction under Title 28 . . . [over] a suit arising out of the controversy between the parties." 9 U.S.C. § 4. Title 28, of course, includes the federal question jurisdiction statute, 28 U.S.C. § 1331, as well as the diversity jurisdiction statute, 28 U.S.C. § 1332. Title 28 did not exist when Congress enacted the FAA in 1925, and instead of referencing Title 28, the original version of § 4 provided for enforcement of an arbitration agreement in federal court if the federal court

has "jurisdiction under the judicial code . . . of the subject matter of a suit arising out of the controversy between the parties." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883. The Judicial Code set forth the original jurisdiction of the federal courts, and when the FAA was enacted in 1925, the Judicial Code included federal question jurisdiction as well as diversity jurisdiction. Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 347-53 (2007).

In 1948, Congress repealed the old Judicial Code and replaced it with Title 28. Act of June 25, 1948, ch. 646, 62 Stat. 869. Congress therefore had to correct the obsolete reference to the old Judicial Code in the jurisdictional language of § 4 of the FAA. In 1954, Congress amended § 4 of the FAA and several other statutes "which at present refer to laws that have been repealed or are obsolete and have been superseded by later laws." S. REP. NO. 83-2498, at 8 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 3991.

When Congress amended the jurisdictional language of § 4 of the FAA in 1954, Congress explicitly cited the federal question jurisdiction statute in the legislative history to illustrate its intent regarding the newly amended jurisdictional language of § 4:

> Also in the first sentence [of § 4 of the FAA], "Title 28, in a civil action" was substituted for "the judicial code at law, in equity." The judicial code (of 1911) was repealed in 1948 when Title 28 of the United States Code, entitled "Judiciary and Judicial Procedure,"

> was enacted into law. That title sets out the general jurisdiction of district courts in civil and admiralty matters. ***See section 1331*** et seq., thereof.

Id. (emphasis added). Thus, the legislative history of the amendments to the jurisdictional language of § 4 expressly sets forth the federal question jurisdiction statute, 28 U.S.C. § 1331, as an example of a statute intended to be covered by the broad reference to Title 28 in § 4 of the FAA.

Reading this legislative history together with the plain language of § 4, the FAA simply instructs federal courts to set aside the arbitration agreement and consider whether the court would have subject matter jurisdiction pursuant to Title 28, including both federal question and diversity jurisdiction, over the dispute to be arbitrated.

III. The Constricted *Westmoreland* Approach Threatens To Undermine The FAA And The Enforcement Of Arbitration Agreements

Through the FAA, the federal judiciary plays a substantial role in facilitating arbitration throughout the United States. When Congress enacted the FAA in 1925, Congress erected a legal framework to support arbitration, and the constricted *Westmoreland* approach advocated by Petitioner threatens to minimize the proper role of the federal courts under this legal framework. The jurisdictional issue on appeal is significant because the *Westmoreland* approach

undermines the ability of parties to enforce arbitration agreements in federal court, which is a core purpose of the FAA, and as explained below, there are concerns with respect to enforcing arbitration agreements in state courts. In addition, FAA scholars have recognized that not only is the *Westmoreland* approach historically flawed and contrary to the express language of § 4, but also the *Westmoreland* approach urged by Petitioner threatens to dismantle the entire legal framework of the FAA, not just the enforcement provision of § 4.

A. The *Westmoreland* Approach Undermines The Ability To Enforce Arbitration Agreements In Federal Court

The FAA is considered landmark legislation for reversing a long-standing judicial reluctance to enforce arbitration agreements. Prior to the enactment of the FAA and similar state statutes during the 1920s, courts generally would not specifically enforce arbitration agreements. Arbitration agreements were revocable at any time before the issuance of an arbitrator's award, and as a result, arbitration agreements were considered "in large part ineffectual" prior to the 1920s. S. REP. NO. 68-536, at 2 (1924). Congressional testimony regarding the proposed bills that would become the FAA expressed frustration with the inability to enforce arbitration agreements. The legislative history recognizes that even when an arbitration proceeding had already commenced, a party "can go in and watch the expression on the face

of [the] arbitrator," and if the party had a "hunch" that the arbitrator would issue an adverse ruling, the party could simply withdraw and say "I do not believe in arbitration any more." 1924 Hearings at 14. Parties could "back out at the last moment when they see the case is going against them." *Id.* at 7.

Section 2 of the FAA, which has been described as the FAA's "centerpiece," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), reversed this long-standing judicial refusal to enforce arbitration agreements and forcefully proclaimed that arbitration agreements are "valid, irrevocable, and enforceable." 9 U.S.C. § 2. A House Report described the FAA in a nutshell as "declar[ing] simply that such agreements for arbitration shall be enforced, and provid[ing] a procedure in the Federal courts for their enforcement." H.R. REP. NO. 68-96 (1924). The jurisdictional issue on appeal threatens to undermine the FAA by curtailing the opportunities for federal court enforcement of arbitration agreements.

The *Westmoreland* approach may be tantalizing to some opponents of arbitration because the *Westmoreland* approach limits the ability to enforce arbitration agreements in federal courts,[18] and the consequences of denying a federal forum for the

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[18] Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 323 n.15, 324 (2007).

enforcement of arbitration agreements can be significant. It has been observed that "state courts are more likely to refuse to enforce arbitration agreements than are federal courts," and "the decided cases do seem to support such a general differentiation." Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 94 (1998).

Commentators have observed that some state courts are applying an overly narrow view of commerce in order to avoid the application of the FAA. Kirsten Brown, *State Court Attempts To Limit The Applicability Of The Federal Arbitration Act In A Post-Lopez World*, 56 U. MIAMI L. REV. 1051 (2002). In addition, § 2 of the FAA allows for generally applicable state-law contract defenses to invalidate an arbitration agreement, and commentators have found that state courts are avoiding the enforcement of arbitration agreements by misapplying state-law contract defenses. Stephen A. Broome, *An Unconscionable Application Of The Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006); Shirley A. Wiegand, *Arbitration Clauses: The Good, The Bad, The Ugly*, 47 OKLA. L. REV. 619, 640 (1994) ("Recent cases reveal continued hostility to the arbitration trend, particularly by some state courts. . . ."); Sandra F. Gavin, *Unconscionability Found: A Look At Pre-Dispute Mandatory Arbitration Agreements 10 Years After Doctor's Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 270 (2006)

(recognizing a "backlash taking place in state courts today" toward the arbitration process); *cf. Preston v. Ferrer*, 128 S. Ct. 978 (2008) (reversing California Court of Appeal's decision applying state law that delays arbitration until administrative proceedings are completed); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (reversing Montana Supreme Court's decision to apply Montana law disfavoring arbitration agreements). In light of such concerns regarding enforcing arbitration agreements in state courts, the availability of a federal forum is significant, and when Congress enacted the FAA, Congress specifically declared that a federal court would be available for enforcement of arbitration agreements to the fullest extent of the court's jurisdiction over the dispute to be arbitrated. 1924 Hearings at 34 ("The Federal Courts are given jurisdiction to enforce such agreements ***whenever under the Judicial Code*** they would normally have jurisdiction of a controversy between the parties.") (emphasis added).

B. The *Westmoreland* Approach Threatens To Undermine The Entire Legal Framework Of The FAA, Not Just The Important Enforcement Provision Of § 4

This case involves the construction of statutory language found in § 4 of the FAA, which provides for the enforcement of arbitration agreements. However, this case has broader significance because this case could influence the way jurisdiction is considered with respect to the FAA in its entirety.

The FAA is a unitary statute. While § 2 of the FAA declares arbitration agreements to be enforceable, §§ 3 and 4 of the FAA are the core sections providing for judicial action and implementing the main principle found in §2, and the remainder of the FAA's provisions help facilitate arbitration. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999). Out of the two core sections of the FAA providing for judicial action, §§ 3 and 4, a jurisdictional principle emanates that independent jurisdiction is necessary for a federal court to enforce any other FAA section, such as §§ 7, 8, 9, and 10. *Id.* Under any provision of the FAA, a party must establish that, if there were no arbitration agreement, the court would have subject matter jurisdiction over the underlying dispute to be arbitrated. *Id.* As explained by leading FAA scholars, such a unified theory of jurisdiction is desirable:

> [This unified theory of jurisdiction regarding the FAA] fully complies with the requirement of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (U.S. 1983) and *Southland Corp. v. Keating* (U.S. 1984) that the FAA does not create federal jurisdiction. It does so without tortured, ahistorical reading of FAA § 4, with proper respect for genuine history, and without creating the adverse effects of [the flawed *Westmoreland* approach].

1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999).

One of the several adverse effects of the *Westmoreland* approach is that its "tortured, ahistorical reading" of § 4 threatens the operation of the entire FAA, not just § 4. *Id.* A simple petition to compel arbitration is often the "trigger for bringing into operation all the rest of the FAA, including general federal arbitration law." *Id.* If a party were denied the opportunity to have a federal court hear a petition to compel arbitration, the party would also be denied all rights to have federal courts decide numerous complex issues under the FAA. *Id.* In sum, the constricted *Westmoreland* approach advocated by Petitioner threatens to undermine the entire FAA and its policy favoring arbitration. *Id. See also* Richard A. Bales & Jamie Ireland, *Federal Question Jurisdiction and the Federal Arbitration Act*, COLO. L. REV. (forthcoming 2008) ("the [*Discover Bank*] approach is most consistent with the liberal policy favoring arbitration"), *available at* http://ssrn.com/abstract=1112304.

CONCLUSION

Amici respectfully request the Court to affirm the Fourth Circuit's decision below finding that jurisdiction in connection with § 4 of the FAA should be based on the underlying dispute to be arbitrated.

Respectfully submitted,

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